82 - 1142
No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

SHARON STEEL CORPORATION, et al.,

Petitioners,

—v.—

THE CHASE MANHATTAN BANK, N.A., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether Federal Courts should imply substantive terms into trust indentures, as was done here by the Second Circuit, or whether the rights and obligations of debentureholders and issuers of debentures are restricted to those explicitly set forth in trust indentures, a long-standing rule recently endorsed by the Fifth Circuit sitting in banc.

LISTING OF PARTIES

Petitioners in addition to Sharon Steel Corporation include:

UV Industries, Inc., and David Finkelstein, Arthur R. Gralla, Martin Horwitz, Edwin Jacobson, Theodore W. Kheel and Paul Kolton, as Trustees of the UV Industries, Inc. Liquidating Trust.

Respondents in addition to The Chase Manhattan Bank, N.A., include:

Manufacturers Hanover Trust Company, Union Planters National Bank of Memphis, Connecticut Mutual Life Insurance Company, The Mutual Life Insurance Company of New York, Connecticut General Life Insurance Company, The Penn Mutual Life Insurance Company, Union Dime Savings Bank, IDS Life Insurance Company, IDS Life Insurance Company of New York, Anchor National Life Insurance Company, Bankers Life Insurance Company of Nebraska, Phoenix Mutual Life Insurance Company, United Benefit Life Insurance Company, Life Insurance Company of North America, American National Insurance Company, Standard Life and Accident Insurance Company, General American Life Insurance Company, Monumental Life Insurance Company, Monarch Life Insurance Company, Country Life Insurance Company, Western Life Insurance Company, and Volunteer State Life Insurance Company.

LISTING UNDER SUPREME COURT RULE 28.1

As required by Supreme Court Rule 28.1, set forth below is a listing of the parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of petitioner Sharon Steel Corporation:

Alaska Gold Company

APL Corporation

Bamco GmbH

Birdsboro Corporation

DWG Corporation

Laypsa S.A.

Leon Water Enterprises, Inc.

National Propane Corporation

NVF Company

NVF Europe S.A.

Pennsylvania Engineering Corporation

Pensa S.A.

Public Gas Company

Richmond-Eureka Mining Company

Ruby Hill Mining Company

Security Management Corporation

Steel Corporation of Texas

Southeastern Public Service Company

Universal Housing & Development Corporation

Wilson Brothers

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 28, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 691 F.2d 1039 (2d Cir. 1982), appears in Appendix A hereto. The opinions of the District Court for the Southern District of New York, reported at 521 F. Supp. 104 (S.D.N.Y. 1981) and 521 F. Supp. 118 (S.D.N.Y. 1981), appear respectively in Appendix B and Appendix C hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1982. A timely petition for rehearing with a suggestion for rehearing in banc was denied on November 12, 1982. (The order denying the petition is attached as Appendix E hereto.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Background

The central issue in this action is whether petitioner Sharon Steel Corporation ("Sharon Steel") is entitled to become the successor obligor on approximately $107,000,000 of long-term, low-interest debt incurred over a period of time by petitioner UV Industries, Inc. ("UV") pursuant to four separate trust indentures and lease guaranties (the "Indentures"), or whether the debt must instead be repaid now. Such repayment would permit the holders of the debt to re-invest the proceeds at today's higher interest rates. The respondents are four banks which acted as indenture trustees under the Indentures (the "Indenture Trustees") and a group of twenty institutional investors (nineteen insurance companies and one bank) which intervened in this action and are holders of approximately $47,000,000 of debentures issued pursuant to one of the Indentures (the "Intervenors"). (As institutional investors, the Intervenors hold very large portfolios of bonds and debentures issued pursuant to both public and private indentures[1] and, consequently, have a significant interest beyond the scope of

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1 For example, as of December 31, 1980, respondent Penn Mutual Life Insurance Company reported approximately $1,107,000,000 in debentures and bonds in its portfolio and respondent Connecticut Mutual Life Insurance Company reported approximately $1,295,000,000. As of December 31, 1981, respondent Mutual Life Insurance Company of New York reported approximately $396,338,000 of such holdings.

this action in seeking expansion of the rights of debentureholders and bondholders.)

More specifically, at various times between 1965 and 1977, UV incurred long-term debt obligations by the issuance of bonds and debentures (the "Debentures") due at various times ranging to 1997. By November 1979, there remained outstanding approximately $107,000,000 in principal amount of bonds and debentures which had been issued pursuant to the four Indentures. Each of these Indentures contains a standard provision (hereinafter referred to as the "standard successor obligor provision") which requires and entitles a corporation that purchases "all or substantially all" of UV's assets to succeed to UV's debt obligations.[2]

On November 26, 1979, Sharon Steel purchased all UV's assets for approximately $518,000,000 in cash and securities, assumed UV's liabilities (with exceptions not relevant here) and asked the Indenture Trustees to recognize it as UV's successor obligor.[3] At the time of the purchase and Sharon Steel's request to the Indenture Trustees, UV had made every regular payment of interest and principal on the Debentures and no default of any type had occurred under any of the Indentures. (Thereafter, Sharon Steel continued to make all such payments while this matter was being litigated.) In short, when Sharon Steel purchased all UV's assets on November 26, 1979, the Indentures were viable and ongoing contracts with all of their provisions in full force and effect, including the standard successor obligor provisions, which allowed, indeed required, the purchaser of all or substantially all UV's assets to succeed to UV's indenture obligations.

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2 The standard successor obligor provisions of each of the Indentures are quoted in full in the Court of Appeals' opinion. 691 F.2d at 1043-44 nn.4-7; App. A at 7a-10a nn.4-7.

3 Upon acquiring UV's assets, Sharon Steel had assets of $1,110,779,000 and a net worth of $257,300,000.

The Indenture Trustees refused to recognize Sharon Steel as the successor obligor. They contended that, because UV had eight months previously adopted a voluntary liquidation plan and sold a large amount of assets[4] before the sale to Sharon Steel, Sharon Steel did not purchase "all or substantially all" of UV's assets and that the sale to Sharon Steel constituted a default under the Indentures. (UV was a highly successful company and not in financial difficulty. It adopted the liquidation plan for independent business reasons. The Indenture Trustees conceded that the adoption of the liquidation plan was not a default under the Indentures.[5])

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4 The primary asset disposed of was Federal Pacific Electric Company ("Federal"), a wholly-owned subsidiary of UV which was sold on March 29, 1979. Federal constituted approximately 44% of the book value of UV's assets at that time. From the proceeds of the sale of Federal for $345 million, UV made an initial liquidating distribution of $274 million and kept the remaining $71 million. UV also sold certain oil and gas properties for approximately $135 million but retained all the proceeds, which were part of the assets bought by Sharon Steel on November 26, 1979. With the single exception of the initial liquidating distribution, the assets Sharon Steel acquired on November 26, 1979 included all the assets UV held when it adopted the voluntary liquidation plan or the proceeds from the sale of those assets. It was conceded below that no provision of the Indentures was breached by these sales or by the liquidating distribution.

5 Indeed, neither of the courts below found that any default existed under the Indentures prior to November 26, 1979, and the Indenture Trustees admitted the absence of any such default. For example, Manufacturers made the following admission in June 1979 in a letter to one of its Debentureholders:

> "In our opinion and in the opinion of our counsel, neither the approval by stockholders [of UV] of the Plan of Liquidation and Dissolution, nor the initial liquidating dividend constitutes a default under the Indentures. Nor are we aware of any other act or omission on the part of UV which constitutes a default under the Indenture. Absent a default under the Indenture, neither the Trustee nor the Debentureholders can, in our opinion, require UV to call the Debentures or in any other way compel payment of the Debentures other than in accordance with the terms of the Debentures and of the Indenture." 691 F.2d at 1046 n.11; App. A at 13a n.11.

Sharon Steel then commenced the present action to compel the Indenture Trustees to recognize it as UV's successor obligor. The jurisdiction of the District Court was based on the diversity of citizenship of the parties and on claims arising under the federal antitrust laws.

The Proceedings Below

The action was tried before a jury in the United States District Court for the Southern District of New York. At the close of Sharon Steel's case, the District Court dismissed Sharon Steel's claims (521 F. Supp. 104; App. B at 33a) and granted summary judgment in favor of the Intervenors and Indenture Trustees (521 F. Supp. 118; App. C at 56a). A judgment was entered on August 18, 1981 (App. D at 74a) requiring, *inter alia*, repayment of the $107,000,000 in outstanding principal.

The judgment was appealed to the United States Court of Appeals for the Second Circuit. In an opinion dated September 28, 1982 (App. A), the Second Circuit affirmed the District Court's judgment for the outstanding principal amount of the Debentures, holding that the standard successor obligor provisions contained in the Indentures

> "do not permit assignment of the public debt to another party in the course of a liquidation unless 'all or substantially all' of the assets of the company at the time the plan of liquidation is determined upon are transferred to a single purchaser." 691 F.2d at 1051; App. A at 26a.

Sharon Steel petitioned for a rehearing and suggested that, in light of the Fifth Circuit's in banc decision in *Broad v. Rockwell International Corp.*, 642 F.2d 929 (5th Cir.) (in banc), *cert. denied*, 454 U.S. 965 (1981), the rehearing be before the Second Circuit in banc. That petition was denied on November 12, 1982 (App. E at 85a).

REASONS FOR GRANTING THE WRIT

The Second Circuit's opinion represents an unprecedented and unwise way of dealing with trust indenture disputes. This new approach expressly rejects a literal reading of indenture language in favor of a wide-range policy analysis that has, and cites, no support in the authorities. Such a policy-analysis approach, which results here in the implication of substantive contractual terms, might be appropriate in other areas of the law. It is unsuitable, however, to an area of the law that demands certainty and predictability, that has heretofore been treated as being governed by the literal meaning of contractual terms, and that as a result has been largely self-regulating.

The policy-analysis approach of the Second Circuit invites a substantial and undesirable upsurge of litigation in this area of the law. There are, of course, many thousands of outstanding trust indentures governing billions of dollars of outstanding debentures and bonds held by untold thousands of corporations and individuals. In the last eight years alone over $300 billion have been loaned to American corporations in return for debentures and bonds.[6] Parties aggrieved by the literal meaning of indenture language—of which there will be no shortage—will now be strongly encouraged by the Second Circuit's opinion to try their chances in the Federal courtroom.

Moreover, as we explain below, the Second Circuit's policy analysis is largely premised on assertions that are demonstrably incorrect.

Recently, twenty-four judges of the Fifth Circuit sitting in banc vacated a panel decision and expressly endorsed, in an exhaustive opinion, the traditional approach of reading indenture language literally. *Broad v. Rockwell International Corp.*, 642 F.2d 929 (5th Cir.) (in banc), *cert. denied*, 454 U.S. 965

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6 Bureau of the Census, United States Department of Commerce, *Statistical Abstract of the United States*, § 17 Banking, Finance & Insurance, No. 879, at 524 (102d ed. 1981).

(1981) (hereinafter "*Broad v. Rockwell*"). We submit that there is no sound basis in law or policy for the radically different approach adopted by the Second Circuit, that the conflict between these two Circuits will necessarily cause disparity, confusion and unpredictability, and that as a result, the efficient working of the capital markets will be impaired.

The implication of substantive terms into trust indentures is a new arena into which other Federal Courts will or will not venture, depending on the guidance they receive from this Court.

The involvement of this Court is warranted not simply because of the conflict created by the Second Circuit's bold departure, but also because in recent years, the seeds for a burgeoning of litigation concerning trust indentures, including disputes as to implied rights of action under the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa *et seq.*, have been sowed in various other Federal Court decisions.[7] Such decisions are also notable for their lack of consistency. *See infra* at 15. We submit that now is the time for this Court to become involved and to shape and limit the development of the law—and litigation—in this area.

In light of these factors, as well as the enormous amount directly at stake in this dispute, we respectfully urge this Court to review the decision below.

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7 *See, e.g., Pittsburgh Terminal Corp. v. Baltimore & Ohio Railroad Co.*, 680 F.2d 933 (3d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3409 (U.S. Nov. 29, 1982); *Zeffiro v. First Pennsylvania Banking & Trust Co.*, 623 F.2d 290 (3d Cir. 1980), *cert. denied*, 102 S. Ct. 2295 (1982); *Van Gemert v. Boeing Co.*, 520 F.2d 1373 (2d Cir.), *cert. denied*, 423 U.S. 947 (1975), *appeal after remand*, 553 F.2d 812 (2d Cir. 1977); *Morris v. Cantor*, 390 F. Supp. 817 (S.D.N.Y. 1975).

I.

THE SECOND CIRCUIT RADICALLY AND UNWISELY DEPARTS FROM EXISTING INDENTURE LAW BY IMPLYING SUBSTANTIVE TERMS

A. Rights and Obligations Must Be Established in the Indenture Contract

The significance of indentures and their proper interpretation to the corporate and investment communities cannot be over-estimated. Long-term debt issued pursuant to indentures is part of the life-blood of American industry.

It has long been recognized that the creditor/debtor relationship established by the issuance of long-term debt pursuant to an indenture is a creature of contract and that the controlling contract is the indenture. As noted in the American Bar Foundation's *Commentaries on Model Indenture Provisions* (1971) (the "*Commentaries*"), at 2, there is no governing body of statutory or common law to which debentureholders may turn, and thus their rights must be established "through contractual provisions set forth in the debt agreement or indenture. . . ."

Because these contracts must establish the rights and obligations of debtor and creditor over a period of many years, they are usually quite lengthy, and they "attempt to anticipate and deal with in advance all possible contingencies that might call into question the operation of those rights and obligations." *Broad v. Rockwell, supra*, 642 F.2d at 941; *see Parkinson v. West End Street Railway Co.*, 173 Mass. 446, 53 N.E. 891 (1899) (Holmes, J.).

When indenture contracts are entered into, it is clear that the long-term relationship thus established may be buffeted by many changes in the obligor's operational and financial condition, not to mention significant changes in the nation's economic climate. Nevertheless, any rights to be asserted during the long life of the relationship must be established with

specificity at the outset in the indenture contract. In short, if protection is desired against future actions that the corporate obligor might take over the long life of an indenture, it "must be provided by contract if it is to be provided at all." *Broad v. Rockwell, supra,* 642 F.2d at 943.

B. The Traditional Approach of the Courts Has Served the Need for Certainty

When changed circumstances (such as a precipitous rise in prevailing interest rates) spark a dispute between the parties to an indenture contract, the courts are presented with a strong temptation to rewrite the contract in a manner believed equitably to account for such new circumstances. Until the Second Circuit's opinion in the present action, the courts have for nearly a century resisted this temptation. *See, e.g., Broad v. Rockwell, supra,* 642 F.2d at 947, 956; *Lisman v. Milwaukee, Lake Shore & Western Railway Co.*, 161 F. 472 (C.C.E.D. Wis. 1908), *aff'd mem.*, 170 F. 1020 (7th Cir.), *cert. denied*, 214 U.S. 520 (1909); *Parkinson v. West End Street Railway Co., supra,* 173 Mass. 446, 53 N.E. 891; *Kessler v. General Cable Corp.*, 92 Cal. App. 3d 531, 539, 544-45, 155 Cal. Rptr. 94, 100, 103 (Cal. Ct. App. 1979); *Levine v. Chesapeake & Ohio RR. Co.*, 60 A.D. 2d 246, 400 N.Y.S. 2d 76 (1st Dep't 1977).

This classic rule of indenture law was reiterated in the Fifth Circuit's in banc decision in *Broad v. Rockwell*:

> "It is not the function of a court to rewrite a contract's terms in the process of 'interpretation' to make them accord with the court's sense of equity." 642 F.2d at 956.

The rationale behind this rule is not difficult to discern and, in fact, was alluded to in the Second Circuit's opinion: a high degree of certainty is necessary for the "efficient working of capital markets." 691 F.2d at 1048; App. A at 19a. The Second Circuit cited this need for certainty as a reason why standard indenture provisions must be interpreted by judges rather than juries. The opinion seems not to recognize, however, that this

need must also constrain judges. After all, parties must "adjust their affairs," *id.*, according to the specific provisions of trust indentures. These parties include—in addition to debenture-holders, obligors and trustees—banks extending short-term credit to an obligor, subsequent long-term lenders, underwriters and other companies which may participate in any type of corporate transaction with an obligor.

Each of these persons or entities is entitled to a greater degree of certainty than that offered by the Second Circuit. They are entitled to the certainty on which they have come to rely after decades of experience: the certainty that the language of an indenture means exactly what it says, and that an indenture will not be distorted to meet the exigencies of an unusual fact situation.

That is precisely the certainty which is impaired by the Second Circuit's decision. The certainty that the Second Circuit says is inherent in the guarantee that the judiciary, and not juries, will interpret standard indenture language is illusory unless the judiciary holds itself to the traditional standard. This is illustrated by comparing the Second Circuit's decision to the Fifth Circuit's in banc decision in *Broad v. Rockwell.*

C. *Broad v. Rockwell* and the Instant Case Conflict

The Fifth Circuit, noting that the indenture in issue "was drafted to provide, insofar as humanly possible, for every imaginable contingency," 642 F.2d at 951, rejected the notion that it was empowered to rewrite the indenture by implying rights or restrictions under the guise of "interpretation" or equity. *Id.* at 947, 956. Rather, it stressed the fundamental necessity and importance of interpreting indentures strictly to give the "words and phrases employed in the contract their plain meaning." *Id.* at 948. Using that approach, the Fifth Circuit found that no protection against a cash merger was specifically included in the indenture, although it clearly could have been, and refused to rewrite the contract to confer such protection. *Id.* at 952-53. The Fifth Circuit's detailed analysis

of the indenture provisions, *id.* at 948-55, stands in stark contrast to the Second Circuit's disregard for the language of the Indentures in the case at bar. *See* 691 F.2d at 1049; App. A at 21a.[8]

In the present case the Second Circuit has rewritten the Indentures, apparently "to accord with its instinct for the dispensation of equity under the facts of this case." 642 F.2d at 947.[9] The Indentures simply give no significance to the adop-

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8 Each of the Indentures in issue provides that UV may dispose of its assets by merger, consolidation or by selling all or substantially all of its property to another corporation, provided that successor corporation assumes UV's obligations under the Indenture. None of the Indentures says that "all or substantially all" refers to a quantum of assets other than that which exists on the date of the sale. Nor so far as we know has it ever before been claimed that this phrase in successor provisions of indentures refers to some other date. This is hardly surprising since the sentence in which the phrase occurs speaks on its face in the present tense.

At trial Sharon Steel presented the testimony of a renowned indenture expert, who was a member of the American Bar Foundation's steering and advisory committees which oversaw the publishing of the *Commentaries*. He testified that in fifty years of practice he had never known the phrase "all or substantially all" in the standard successor provision to refer to anything other than the assets existing on the day of the sale to the would-be successor. Trial Transcript at 1088-89.

That the plain and literal meaning of the standard successor obligor provisions is as Sharon Steel contends is established not only by the language used but also by the context in which it is employed. The same provision, after all, refers to two other types of transactions—mergers and consolidations—which by definition involve all the assets of the company on the day of the transaction, not some unspecified date in the past.

9 The conflict inherent in the approach to indenture law taken by the Second and Fifth Circuits permeates the two opinions. For example, in *Broad v. Rockwell* the court noted that corporate transactions such as mergers, sales of assets, dissolutions and liquidations may well dilute debentureholders' conversion rights but concluded that protection against such transactions must be provided by contract if it is to be provided at all. 642 F.2d at 943 (citing *Parkinson v. West End Street Railway Co.*, 173 Mass. 446, 53 N.E. 891 (1899)(Holmes, J.)). In the present action, the Second Circuit apparently viewed the fact that such transactions may downgrade the value

tion of a plan of voluntary liquidation, although other indentures specifically provide that adoption of such a plan is an event of default. The Indenture Trustees do not contend that adoption of the liquidation plan was a default. *See* 691 F.2d at 1046 n.11; App. A at 13a n.11. The adoption of such a plan was, in the words of a case prominently relied upon by the Fifth Circuit in *Broad v. Rockwell*, "only one of several vicissitudes liable to happen during . . . the life of the corporation . . . which the debenture holders were . . . bound to anticipate." *Lisman v. Milwaukee, Lake Shore & Western Railway Co., supra*, 161 F. at 478.

Similarly, the Indentures do not use the explicit language that every indenture lawyer knows must be used when a reference back to prior asset sales is intended. The *Commentaries* themselves contain a sample of such language, which specifically refers to considering present asset sales "*together with all prior*" sales. *Commentaries* at 426-27 (emphasis added).

The parties could have provided in these Indentures, as is provided in other indentures, that adoption of a plan of voluntary liquidation is a default—but they did not. They could have used the "together with all prior" sales language—but they did not. In the phrase of Justice Holmes in *Parkinson*

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of the debtholders' investment as a reason for implying restrictions not provided in the indenture contract. 691 F.2d at 1050-51; App. A at 23a-25a.

In reaching its decision in *Broad v. Rockwell*, the Fifth Circuit acknowledged that there were at least three types of indenture provisions which could have been used to prevent dilution of conversion rights, and noted that there would be no unfairness in denying debentureholders protection if such provisions were not included in the indenture. 642 F.2d 929. In the present action, the Second Circuit was apprised of numerous covenants that could have easily provided the debentureholders here the protection against dissipation of assets they now seek. None of those was included in the Indentures. Instead of following the lead of the Fifth Circuit, however, the Second Circuit perceived the omissions of available protections as its cue to include by implication that which the parties clearly did not include as part of their contractual bargain.

v. West End Street Railway Co., supra, 173 Mass. at 449, 53 N.E. at 892 (a case also given great weight in *Broad v. Rockwell*), the law provides the "machinery" for the protection now sought, but that "machinery" was not used. That the parties did not incorporate it in the language of the Indentures is not an invitation for the courts to do so.

The Second Circuit has, unlike the Fifth Circuit, ignored the language of the contracts in issue, has criticized Sharon Steel for taking a "literalist" approach, 691 F.2d at 1049; App. A at 21a, and has instead reached a determination based on a broad policy analysis. Referring to the indenture language only to conclude that the words cannot mean what they actually say, the Second Circuit has unabashedly implied a substantive term into the Indentures, *i.e.*, that the "all or substantially all" language refers to the quantity of assets held by an obligor on the day a plan of liquidation is determined upon. 691 F.2d at 1051; App. A at 26a.

As noted below, *infra* at 15, the conflicting approaches of the Fifth and Second Circuits have also caused confusion in the Third Circuit. *See Pittsburgh Terminal Corp. v. Baltimore & Ohio Railroad Co.*, 680 F.2d 933 (3d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3409 (U.S. Nov. 29, 1982) (hereinafter *"Pittsburgh Terminal"*). What certainty is there when three of this country's most important courts cannot agree on a basic approach to indenture interpretation? How are parties to "adjust their affairs" to comport with various indenture requirements when those requirements can no longer be reliably discerned from the plain meaning of the language employed, but must be divined from various and shifting notions of policy held by various courts across the land? The answer is that the policy-analysis approach adopted by the Second Circuit, unlike the literalist approach of the Fifth Circuit, is inconsistent with the very need for certainty that the Second Circuit purported to serve. This approach is also inconsistent with the policy of the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa *et seq.*, to promote uniformity in the field of trust indentures.

The Second Circuit's bold departure in the instant case was perhaps foreshadowed to some degree by its opinion in *Van Gemert v. Boeing Co.*, 553 F.2d 812 (2d Cir. 1977), *on appeal after remand from* 520 F.2d 1373 (2d Cir.), *cert. denied*, 423 U.S. 947 (1975). There the Second Circuit held that the obligor had given inadequate notice of a forced redemption of convertible debentures to allow the holders a meaningful opportunity to exercise the conversion feature, and that this failure constituted a breach of the covenant of good faith and fair dealing (*i.e.*, not to do anything to prevent the other party from enjoying the fruits of the contract) that is implied in every contract. 553 F.2d at 815.

Van Gemert was not relied on by the Second Circuit here and is not relevant for at least two reasons. First, the instant case does not involve—and neither the adverse parties nor the courts below have ever asserted that it involves—any breach of any implied covenant of good faith and fair dealing. Second, as the Fifth Circuit observed in *Broad v. Rockwell* in distinguishing *Van Gemert*, the "loss" alleged by the holders in *Van Gemert* resulted from "administrative procedures" in the indenture that the court found unsatisfactory, and the case—unlike the instant case and *Broad v. Rockwell*—did not turn "on the question of substantive rights that are basic to the nature of the contract." 642 F.2d at 958. Indeed, what the Fifth Circuit said in *Broad v. Rockwell* to distinguish *Van Gemert* is especially applicable here, *mutatis mutandis*:

> "The risk of merger [or, here, of a sale of assets to a successor obligor after having previously sold other assets] was inherent in the investment made by the holders of Debentures. Rockwell and the Trust Company did nothing that could be described as 'destroying or injuring the right of the other party to receive the fruits of the contract,' because . . . the benefits that the holders of Debentures received were all the rights to which they were contractually entitled. Indeed, had Rockwell conferred on the holders of Debentures rights significantly greater than those set out in the Indenture, it might have faced claims

by its own shareholders for waste and corporate mismanagement." 642 F.2d at 958.

While *Van Gemert* is thus inapposite here, it is noteworthy that even its limited holding involving implication of administrative procedures has already caused considerable disagreement among judges in the Fifth and Third Circuits. *Compare Broad v. Rockwell,* 614 F.2d 418, 429-30 (5th Cir. 1980) (panel decision), *vacated and reheard in banc,* 642 F.2d 929 (5th Cir.), *cert. denied,* 454 U.S. 965 (1981), *with Broad v. Rockwell, supra,* 642 F.2d at 957-58 (in banc decision), *and compare Pittsburgh Terminal, supra,* 680 F.2d at 941 (majority opinion), *with* 680 F.2d at 951-52 (dissenting opinion).[10] If it should now become the law that *substantive* terms may be implied into indentures, it is likely that such disagreement will proliferate throughout the Federal judiciary.

D. The Second Circuit's Opinion Will Breed Litigation

Moreover, the uncertainty engendered by the Second Circuit's decision will no doubt breed litigation. The many parties whose interests may not be served by the literal meaning of indenture language will take hope that what cannot be found

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10 The confusion resulting from the conflicting approaches of the Second and Fifth Circuits was particularly evident in *Pittsburgh Terminal.* One of the issues in *Pittsburgh Terminal* was whether the obligor had a duty under the indenture to give the debentureholders advance notice of a distribution of stock. Judge Gibbons, writing for the majority, relied on *Van Gemert* to conclude that such notice was required by the implied covenant of good faith. 680 F.2d at 941. Judge Garth, concurring in the result on other grounds, found it unnecessary to reach the indenture issue. *Id.* at 943. Judge Adams, who addressed most of his dissenting opinion to the indenture issue, relied on *Broad v. Rockwell* to find that no advance notice requirement existed. *Id.* at 949. He refused to imply notice requirements beyond those contained in the indenture:

> "Virtually every modern commentator appears to agree with the *Broad* court that . . . debenture holders have no cause to complain about legal corporate conduct that adversely affects the value of the [investment] unless such conduct has been explicitly proscribed or otherwise addressed in the debenture indenture." *Id.* at 948.

within the four corners of their indenture contracts will be implied into the contracts by the Federal Courts.

It is precisely this search for solutions dehors the indenture contract that has heretofore been avoided in the indenture field—with good reason.

To paraphrase Judge Adams' dissent in *Pittsburgh Terminal*:

> "For this Court today—[many] years after the drafting of the [I]ndenture[s]—to ignore what was set forth as the intent of the parties and fundamentally to alter the terms of the contract is . . . not only legally erroneous but improvident." 680 F.2d at 954.

II.

THE SECOND CIRCUIT'S OPINION IS PREMISED ON ASSERTIONS THAT ARE DEMONSTRABLY ERRONEOUS

In ignoring the Indentures' language and carrying out its policy analysis, the Second Circuit has grounded its opinion on assertions that are clearly erroneous.

A. A Literal Reading Supports Sharon Steel's Position and Does Not, as the Second Circuit States, "Prove Too Much"

The Second Circuit apparently agreed that Sharon Steel's position comports with a literal reading of the successor obligor provision. 691 F.2d at 1049; App. A at 21a.[11] However, the Second Circuit went on summarily to reject this approach

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11 Sharon Steel argued on appeal that as long as there is no default under any other restrictions in an indenture on a given date, the successor obligor provision is applicable when a would-be successor purchases all the property the obligor possesses on that date. Absent a default, an indenture is a valid and ongoing contract which applies to an obligor as it exists in the present. Debentureholders have no security interest in particular assets of an obligor and have no right as to assets previously disposed of, absent a specific provision establishing such a right.

in a pivotal paragraph, which contains a significant error that seems to provide the conceptual gate through which the court proceeded to its erroneous policy analysis. That paragraph reads as follows:

> "Sharon's literalist approach simply proves too much. If proceeds from earlier piecemeal sales are 'assets,' then UV continued to own 'all' its 'assets' even after the Sharon transaction since the proceeds of that transaction, including the $107 million cash for cash 'sale,' went into the UV treasury. If the language is to be given the 'literal' meaning attributed to it by Sharon, therefore, UV's 'assets' were not 'sold' on November 26 and the ensuing liquidation requires the redemption of the debentures by UV. Sharon's literal approach is thus self-defeating." *Id.*

Contrary to the above statement, a literal reading of the successor obligor provision does not require, nor even allow, such an absurd result. It is important to remember that the standard successor obligor provision does not apply to sales of less than substantially all a company's assets; it only comes into play when a transfer of "all or substantially all" an obligor's assets occurs. Thus, if an obligor sells assets (but less than substantially all its assets), it may, without any conceivable violation of the successor obligor provisions, distribute the proceeds of that sale to its stockholders, reinvest the proceeds in different operating assets, or simply retain the proceeds. Whichever action the obligor chooses, it remains obligated under the indenture, and debentureholders must then look to the new body of assets in whatever form or amount they then exist. This process can be repeated any number of times in the life of an indenture contract—and often is. After each sale (if it is of *less than* "substantially all"), the original obligor remains obligated and the assets that are pertinent to the ongoing relationship are the reconstituted body of assets.

In contrast, when an obligor at any given moment in time sells *all or substantially all* the assets then in its possession

(including any proceeds from prior sales of less than substantially all of its assets), the obligor must transfer the debt to the purchaser, and the purchaser becomes the new or "successor" obligor under the indenture. The assets that are then relevant to the new indenture relationship are those thus transferred, together with the additional assets of its own that the purchaser brings to this new relationship. In such circumstances, the fact that, as the Second Circuit suggested, the seller still retains assets in the form of the proceeds of the sale is irrelevant because, after it has sold all or substantially all of its assets (including any proceeds from prior sales of less than substantially all), it can no longer be the obligor. As the Second Circuit itself recognized, "a borrower which sells all its assets does not have an option to continue holding the debt." 691 F.2d at 1050; App. A at 22a. In short, Sharon Steel's "literalist" approach does not contain the fallacy asserted by the Second Circuit. Once an obligor has sold all, the debt has to travel with those assets, and the fact that the seller retains the proceeds from the sale of all has no significance under the indenture.

Sharon Steel respectfully suggests that the Second Circuit fails to come to grips with the fact that the successor obligor provision speaks in the present. It looks neither backward nor forward. It does not require the obligor to sell assets it no longer possesses, nor assets that it does not yet possess. It is sufficient that the obligor sells all that it has at a time when no default exists and the indenture is in full force and effect.[12]

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12 Of course, we are not here talking about sham or fraudulent transactions, and no one has ever asserted that there was anything sham or fraudulent about the Sharon Steel/UV transaction. As was fully explained below, there are adequate safeguards, such as fraudulent conveyance laws, *see, e.g.*, Uniform Fraudulent Conveyance Act §§ 1-12; N.Y. Debtor & Creditor Law §§ 270-81 (McKinney 1977), that protect creditors against sham or fraud, as well as specific indenture provisions (such as dividend restrictions, asset restrictions, and net worth requirements) that explicitly act as bulwarks against an obligor's selling its assets in a series of transactions and then selling an infinitesimal amount of remaining assets to a purported successor obligor.

In the Sharon Steel/UV transaction, of course, there was nothing infinitesimal about the assets UV sold to Sharon Steel: they exceeded half a billion

That is the plain meaning of the standard successor obligor provision.

B. The Second Circuit's Policy Considerations are Misconceived

Finding, erroneously, that Sharon Steel's "literalist" approach "proves too much", the Second Circuit moved on to its broad policy analysis. That analysis also entails erroneous assertions. For example, during its appeal Sharon Steel set forth for the Second Circuit numerous types of corporate transactions which could severely dilute the interest of debentureholders, yet would be totally proper under the standard successor obligor provision. The only distinction between these examples and the instant case is that the former do not involve the adoption of a plan of voluntary liquidation.

The Second Circuit suggests that this distinction is crucial because, in its view, in corporate transactions that do not involve liquidations the self-interest of the obligor's shareholders provides protection for debentureholders that is absent when a voluntary liquidation plan is involved. 691 F.2d at 1050; App. A at 23a-25a. Apparently, the Second Circuit viewed this distinction as necessitating an interpretation that transforms the successor obligor provision into a pervasive restriction which affects asset sales when a plan of voluntary liquidation is adopted (an event nowhere even referred to or given any significance in any of the Indentures), but which has no effect on numerous other corporate dispositions or combinations.[13] The Second Circuit's distinction is misconceived.

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dollars. However, even assuming it were appropriate to look to any date other than the date of the sale to Sharon Steel, the plain fact is that, with one exception (an initial liquidating distribution on April 30, 1979, that strictly complied with dividend restrictions in one of the Indentures), Sharon Steel acquired all the assets UV held when the liquidation plan was adopted or the proceeds from the sale of those assets.

13 The effect of the Second Circuit's interpretation of the successor obligor provision is that, once an obligor adopts a plan of voluntary liquidation, it is automatically prohibited from effecting any further signifi-

The Second Circuit suggests that when a merger is involved, rather than a sale of assets after the adoption of a voluntary liquidation plan, the self-interest of the obligor's shareholders protects debentureholders from a new obligor with a "substantially greater danger of insolvency." 691 F.2d at 1050; App. A at 23a. That may be so if the merger results in an exchange of stock for stock, but clearly is not the case if it is a cash merger, *i.e.*, where the shareholders' interest is bought for cash. In the latter case the self-interest of the shareholders is directly contrary to the interest of the debentureholders in that the shareholders will want to obtain from the new obligor as much cash as possible and will have no interest in the new obligor.

The fallacy of the Second Circuit's distinction is that it focuses on the form of a transaction rather than the substance. Whether the self-interest of shareholders will provide any degree of protection to debentureholders does not depend on whether the transaction in issue is a merger, a sale of assets followed by adoption of a liquidation plan, or a sale of assets preceded by one. It depends entirely on whether the old obligor's shareholders take an interest in the new obligor (in the form of equity or debt) or whether they are cashed out.

In sum, the Second Circuit's "proves too much" argument and its policy analysis lack any support within the four corners of the Indentures and are based on a misconception of the effects of various types of corporate reorganizations.

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cant change in either the quantity or quality of its assets without repaying the debentures. Under this theory, these broad restrictions arise although they are nowhere specified in the indentures and despite the fact that such restrictions are explicitly spelled out in indentures in which their inclusion is intended. Inexplicably, these restrictions would not arise if an obligor engaged in a series of transactions identical to UV's, but did so pursuant to a merger plan, a reorganization plan, or even a liquidation plan adopted *after* the final sale or combination of assets.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: January 7, 1983

Respectfully submitted,

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Opinion of the
United States Court of Appeals
for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 720, 926, 1152, 1153, 1154, 1155
—August Term, 1981

(Argued May 10, 1982 Decided September 28, 1982)

Docket Nos. 81-7664, 81-7682, 81-7674, 81-7692,
81-7694, 81-7702

SHARON STEEL CORPORATION,

Plaintiff-Appellant-Cross Appellee,

—v.—

THE CHASE MANHATTAN BANK, N.A., and
MANUFACTURERS HANOVER TRUST COMPANY,

Defendants-Appellees-Cross Appellants.

MANUFACTURERS HANOVER TRUST COMPANY,

Third-Party Plaintiff-Appellee-Cross Appellant,

—v.—

UV INDUSTRIES, INC.,

Third-Party Defendant-Appellant-Cross Appellee.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, et al.,
Intervenors-Appellees-Cross Appellants,

—v.—

SHARON STEEL CORPORATION,
Plaintiff-Appellant-Cross Appellee,

—and—

UV INDUSTRIES, INC.,
Third-Party Defendant-Appellant-Cross Appellee.

UNION PLANTERS NATIONAL BANK OF MEMPHIS,
as Trustee,
Plaintiff-Appellee-Cross Appellant,

—v.—

UV INDUSTRIES, INC. and DAVID FINKELSTEIN, ARTHUR R. GRALLA, MARTIN HORWITZ, EDWIN JACOBSON, THEODORE W. KHEEL, and PAUL KOLTON, as Trustees of the UV Industries, Inc. Liquidating Trust,
Defendants-Appellants-Cross Appellees,

—and—

SHARON STEEL CORPORATION,
Defendant-Appellant-Cross Appellee.

Before:

FEINBERG, *Chief Judge,*
NEWMAN and WINTER, *Circuit Judges.*

Appeal by Sharon Steel Corporation, UV Industries, and the trustees of the UV Industries Liquidating Trust from a judgment granting a directed verdict and summary judgment by the United States District Court for the Southern District of New York (Henry F. Werker, *Judge*) in favor of the trustees of certain indentures of UV Industries and intervening holders of debentures issued pursuant to certain of those indentures. The trustees and debentureholders cross appeal from certain parts of the judgment.

Affirmed in part and reversed in part.

ARNOLD BAUMAN, New York, New York (W. Foster Wollen, Stephen A. Oxman, Francis X. Markey, Robert J. Hausen, William J.F. Roll, III, Charles M. Lizza, Shearman & Sterling, New York, New York, of counsel), *for Defendant and Plaintiff-Appellant-Cross Appellee Sharon Steel Corporation.*

BRUCE A. HECKER, New York, New York (Ronald H. Alenstein, Ronald D. Lefton, Shea & Gould, New York, New York, of counsel), *for Defendants, Counterclaim-*

Defendants and Third-Party Defendants-Appellants-Cross Appellees, UV Industries, Inc. and the Trustees of the UV Industries, Inc. Liquidating Trust.

FRANK H. WOHL, New York, New York (Rosenman Colin Freundl Lewis & Cohen, New York, New York, of counsel), *for Intervenors-Appellees-Cross Appellants Connecticut Mutual Life Insurance Company, et al.*

ROBERT C. MYERS, New York, New York (Dewey, Ballantine, Bushby, Palmer & Wood, New York, New York, of counsel), *for Defendant-Appellee-Cross Appellant The Chase Manhattan Bank, N.A.*

KELLY DRYE & WARREN, New York, New York, *for Defendant and Third-Party Plaintiff-Appellee-Cross Appellant Manufacturers Hanover Trust Company.*

DONOVAN LEISURE NEWTON & IRVINE, New York, New York, *for Plaintiff-Appellee-Cross Appellant Union Planters National Bank of Memphis.*

WINTER, *Circuit Judge:*

This is an appeal by Sharon Steel Corp. ("Sharon") and UV Industries, Inc. ("UV"), trustees of the UV Liquidating Trust (collectively the "UV Defendants") from grants of a directed verdict and summary judgment

by the United States District Court for the Southern District of New York (Henry F. Werker, *Judge*) in favor of the Trustees of certain UV indentures ("Indenture Trustees") and intervening holders of debentures issued pursuant to certain of those indentures ("Debentureholders"). In opinions reported at 521 F.Supp. 104 (S.D.N.Y. 1981) and 521 F.Supp. 118 (S.D.N.Y. 1981), Judge Werker held that UV's liquidation and unsuccessful attempt to assign its public debt to Sharon rendered UV liable for the principal and accrued interest on the debentures. The Indenture Trustees and Debentureholders cross-appeal from other parts of the judgment.

We affirm in part and reverse in part.

BACKGROUND

1. *The Indentures*

Between 1965 and 1977, UV issued debt instruments pursuant to five separate indentures, the salient terms of which we briefly summarize. In 1965, UV[1] issued approximately $23 million of 5⅜% subordinated debentures due in 1995, under an indenture naming The Chase Manhattan Bank, N.A. ("Chase") as the trustee ("First Chase Indenture"). The current principal amount of the debentures outstanding under that indenture is approximately $14 million.

In 1968, the City of Port Huron, Michigan, issued approximately $22 million in Industrial Development Revenue Bonds, bearing 6¼% interest and due in 1993, under an indenture also naming Chase as the trustee ("Second Chase Indenture"). These bonds were issued by

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[1] Until 1973, UV was known as the United Smelting, Refining and Mining Company.

Port Huron to raise funds for the construction of a facility to be leased by Mueller Brass Company, a UV subsidiary. The rent paid by Mueller Brass covers the principal and interest on the bonds. Moreover, UV executed an unconditional guaranty of these obligations of its subsidiary ("Chase Lease Guaranty"). The principal amount presently outstanding is approximately $16.5 million.

Similarly, in 1968, the County of Itawamba, Mississippi, issued approximately $13 million in Industrial Development Revenue Bonds due in 1993, under an indenture naming Union Planters National Bank of Memphis as the trustee ("Union Planters Indenture"). These bonds were also issued to fund construction of facilities to be leased by Mueller Brass, the rent payments being sufficient to satisfy the debt service on the bonds. Again, UV guaranteed Mueller Brass' lease obligations ("Union Planters Lease Guaranty"). Approximately $9.78 million principal amount of these Itawamba County bonds remains outstanding.

In 1977, UV issued $75 million of 8⅛% debentures due in 1997 under an indenture naming Manufacturers Hanover Trust Company ("Manufacturers") as the trustee ("Manufacturers Indenture"). The principal amount of these debentures has been reduced to approximately $66.78 million. At the same time, UV issued $25 million of 9¼% senior subordinated notes due in 1987 pursuant to an indenture under which United States Trust Company of New York ("U.S. Trust") is the trustee ("U.S. Trust Indenture"). Approximately $16 million principal amount of these notes remains outstanding.[2]

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2 By stipulation during trial, claims and counterclaims between and among Sharon, the UV defendants and U.S. Trust were dismissed with prejudice.

The debentures, notes and guaranties are general obligations of UV. Each instrument contains clauses permitting redemption by UV prior to the maturity date, in exchange for payment of a fixed redemption price (which includes principal, accrued interest and a redemption premium) and clauses allowing acceleration as a non-exclusive remedy in case of a default.[3] The First Chase Indenture,[4] the Port Huron Lease Guaranty,[5] the Union

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3 For example, the Manufacturer's Indenture states:

Remedies Cumulative and Continuing. All powers and remedies given by this Article Six to the Trustee or to the Debentureholders shall, to the extent permitted by law, be deemed cumulative and not exclusive of any thereof or of any other powers and remedies available to the Trustee or the holders of the Debentures, by judicial proceedings or otherwise, to enforce the performance or observance of the covenants and agreements contained in this Indenture. . . .

4 Section 13.01 of the First Chase Indenture reads as follows:

Nothing in this Indenture or any of the Debentures contained shall prevent any merger or consolidation of any other corporation or corporations into or with the Company, or any merger or consolidation of the Company (either singly or with one or more corporations), into or with any other corporation, or any sale, lease, transfer or other disposition of all or substantially all of its property to any corporation lawfully entitled to acquire the same or prevent successive similar consolidations, mergers, sales, leases, transfers or other dispositions to which the Company or its successors or assigns or any subsequent successors or assigns shall be a party; provided, however, and the Company convenants and agrees, that any such consolidation or merger of the Company or any such sale, lease, transfer or other disposition of all or substantially all of its property, shall be upon the condition that the due and punctual payment of the principal of, interest and premium, if any, on, all of the Debentures, according to their tenor, and the due and punctual performance and observance of all the terms, covenants and conditions of this Indenture to be kept or performed by the Company shall, by an indenture supplemental hereto, executed and delivered to the Trustee, be assumed by any corporation formed by or resulting from any such consolidation or merger, or to which all or substantially all of the property of the Company shall have been sold, leased, transferred or otherwise disposed of (such corporation

being herein called the "successor corporation"), just as fully and effectively as if the successor corporation had been the original party of the first part hereto, and such supplemental indenture shall be construed as and shall constitute a novation thereby releasing the Company (unless its identity be merged into or consolidated with that of the successor corporation) from all liability upon, under or with respect to any of the covenants or agreements of this Indenture but not, however, from its liability upon the Debentures.

After the execution and delivery of the supplemental indenture referred to in the preceding paragraph, any order, certificate, resolution or other instrument of the Board of Directors or officers of the Company may be made by the like board or officers of the successor corporation. The Trustee shall receive an Officers' Certificate that the foregoing conditions are complied with, and an Opinion of Counsel that any such indenture supplemental hereto complies with the foregoing conditions and provisions of this Section 13.01. Subject to the provisions of Section 10.01, such Officers' Certificate and Opinion shall be full warrant to the Trustee for any action taken in reliance thereon.

5 Paragraph 8 of the Port Huron Lease Guaranty reads:

The Guarantor will maintain its corporate existence, will not dissolve or otherwise dispose of all or substantially all of its assets and will not consolidate with or merge into another corporation or permit one or more other corporations to consolidate with or merge into it; provided that the Guarantor may consolidate with or merge into another corporation, or permit one or more other such corporations to consolidate with or merge into it, or sell or otherwise transfer to another such corporation all or substantially all of its assets as an entirety and thereafter dissolve, provided the surving, resulting or transferee corporation, as the case may be, if it is not the Guarantor, shall expressly assume in writing all of the obligations of the Guarantor hereunder; provided, however, that neither the Company nor the Guarantor may dispose of all or substantially all of its assets to the other and may not consolidate with or merge into the other unless the Company and the Guarantor deliver to the Trustee and the City an opinion of counsel, satisfactory to the Trustee and the City, that the disposition, consolidation or merger, as the case may be, will not result in the merger of the Lease and Lease Guaranty Agreement or any provisions thereof, but that the Lease and Lease Guaranty Agreement and the provisions thereof will remain separate obligations of the transferee [sic] or consolidated or merged corporation which can be proved and scheduled separately in bankruptcy proceedings (as if the transfer, consolidation or merger had not taken place). The Guarantor will cause the Company to preserve and keep in full force and effect all licenses and permits necessary to the proper conduct of its business.

Planters Lease Guaranty,[6] the Manufacturers Indenture[7] and the U.S. Trust Indenture[8] each contains a "successor

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6 Paragraph 8 of the Union Planters Lease Guaranty reads:

The Guarantor will maintain its corporate existence, will not dissolve or otherwise dispose of all or substantially all of its assets and will not consolidate with or merge into another corporation or permit one or more other corporations to consolidate with or merge into it; provided that the Guarantor may consolidate with or merge into another corporation, or permit one or more other such corporations to consolidate with or merge into it, or sell or otherwise transfer to another such corporation all or substantially all of its assets as an entirety and thereafter dissolve, provided the surviving, resulting or transferee corporation, as the case may be, if it is not the Guarantor, shall expressly assume in writing all of the obligations of the Guarantor hereunder; provided, however, that neither the Company nor the Guarantor may dispose of all or substantially all of its assets to the other and may not consolidate with or merge into the other unless the Company and the Guarantor deliver to the Trustee and the County an opinion of counsel, satisfactory to the Trustee and the County, that the disposition, consolidation or merger, as the case may be, will not result in the merger of the Lease and Lease Guaranty Agreement or any provisions thereof, but that the Lease and Lease Guaranty Agreement and the provisions thereof will remain separate obligations of the transferee or consolidated or merged corporation which can be proved and scheduled separately in bankruptcy proceedings (as if the transfer, consolidation or merger had not taken place). The Guarantor will cause the Company to preserve and keep in full force and effect all licenses and permits necessary to the proper conduct of its business.

7 Section 11.01 of the Manufacturers Indenture reads as follows:

Company May Consolidate, etc., on Certain Terms. Subject to the provisions of Section 11.02, nothing contained in this Indenture or in any of the Debentures shall prevent any consolidation or merger of the Company with or into any other corporation or corporations (whether or not affiliated with the Company), or successive consolidations or mergers in which the Company or its successor or successors shall be a party or parties, or shall prevent any sale, conveyance or lease of all or substantially all of the property of the Company to any other corporation (whether or not affiliated with the Company) authorized to acquire and operate the same; *provided, however,* and the Company hereby covenants and agrees, that any such consolidation, merger, sale, conveyance or lease shall be upon the condition that (a) immediately after such consolidation, merger, sale, conveyance or lease the corporation (whether the Company or such other corporation) formed by or surviving any

such consolidation or merger, or to which such sale, conveyance or lease shall have been made, shall not be in default in the performance or observance of any of the terms, covenants and conditions of this Indenture to be kept or performed by the Company; (b) the corporation (if other than the Company) formed by or surviving any such consolidation or merger, or to which such sale, conveyance or lease shall have been made, shall be a corporation organized under the laws of the United States of America or any State thereof; and (c) the due and punctual payment of the principal of and premium, if any, and interest on all of the Debentures, according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this Indenture to be performed or observed by the Company, shall be expressly assumed, by supplemental indenture satisfactory in form to the Trustee executed and delivered to the Trustee, by the corporation (if other than the Company) formed by such consolidation, or into which the Company shall have been merged, or by the corporation which shall have acquired or leased such property.

8 Section 11.01 of the U.S. Trust Indenture reads as follows:

Company May Consolidate, etc., on Certain Terms. Nothing contained in this Indenture or in any of the Notes shall prevent any consolidation or merger of the Company with or into any other corporation or corporations (whether or not affiliated with the Company), or successive consolidations or mergers in which the Company or its successor or successors shall be a party or parties, or shall prevent any sale, conveyance or lease of all or substantially all of the property of the Company to any other corporation (whether or not affiliated with the Company) authorized to acquire and operate the same; *provided, however,* and the Company hereby covenants and agrees, that any such consolidation, merger, sale, conveyance or lease shall be upon the condition that (a) immediately after such consolidation, merger, sale, conveyance or lease the corporation (whether the Company or such other corporation) formed by or surviving any such consolidation or merger, or to which such sale, conveyance or lease shall have been made, shall not be in default in the performance or observance of any of the terms, covenants and conditions of this Indenture to be kept or performed by the Company; (b) the corporation (if other than the Company) formed by or surviving any such consolidation or merger, or to which such sale, conveyance or lease shall have been made, shall be a corporation organized under the laws of the United States of America or any State thereof; and (c) the due and punctual payment of the principal of and interest on all of the Notes, according to their tenor, and the due and punctual performance and observance of all of the covenants and conditions of this Indenture to be performed or observed by the Company, shall be expressly assumed, by supplemental indenture satisfactory in form

obligor" provision allowing UV to assign its debt to a corporate successor which purchases "all or substantially all" of UV's assets. If the debt is not assigned to such a purchaser, UV must pay off the debt. While the successor obligor clauses vary in language, the parties agree that the differences are not relevant to the outcome of this case.

2. *The Liquidation of UV*

During 1977 and 1978, UV operated three separate lines of business. One line, electrical equipment and components, was carried on by Federal Pacific Electric Company ("Federal"). In 1978, Federal generated 60% of UV's operating revenue and 81% of its operating profits. It constituted 44% of the book value of UV's assets and 53% of operating assets. UV also owned and operated oil and gas properties, producing 2% of its operating revenue and 6% of operating profits. These were 5% of book value assets and 6% of operating assets. UV also was involved in copper and brass fabrication, through Mueller Brass, and metals mining, which together produced 13% of profits, 38% of revenue and constituted 34% of book value assets and 41% of operating assets. In addition to these operating assets, UV had cash or other liquid assets amounting to 17% of book value assets.

On December 19, 1978, UV's Board of Directors announced a plan to sell Federal. On January 19, 1979, the UV Board announced its intention to liquidate UV, subject to shareholder approval. On February 20, 1979, UV distributed proxy materials, recommending approval of

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to the Trustee executed and delivered to the Trustee, by the corporation (if other than the Company) formed by such consolidation shall have been merged, or by the corporation which shall have been merged, or by the corporation which shall have acquired or leased such property.

(i) the sale of Federal for $345,000,000 to a subsidiary of Reliance Electric Company and (ii) a Plan of Liquidation and Dissolution to sell the remaining assets of UV over a 12-month period.[9] The proceeds of these sales and the liquid assets were to be distributed to shareholders. The liquidation plan required "that at all times there be retained an amount of cash and other assets which the [UV Board of Directors] deems necessary to pay, or provide for the payment of, all of the liabilities, claims and other obligations . . . " of UV. The proxy statement also provided that, if the sale of Federal and the liquidation plan were approved, UV would effect an initial liquidating distribution of $18 per share to its common stockholders.

On March 26, 1979, UV's shareholders approved the sale of Federal and the liquidation plan. The following day, UV filed its Statement of Intent to Dissolve with the Secretary of State of Maine, its state of incorporation. On March 29, the sale of Federal to the Reliance Electric subsidiary for $345 million in cash was consummated. On April 9, UV announced an $18 per share initial liquidating distribution to take place on Monday, April 30.

The Indenture Trustees were aware that UV contemplated making an $18 per share liquidating distribution since at least February 20, 1979 (the date the proxy materials were distributed).[10] On April 26, representatives

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9 Completion of the Liquidation Plan within 12 months was necessary for tax reasons. If so completed, UV would avoid recognition of any taxable gain on the sale of Federal and its other assets and UV shareholders could treat liquidation distributions as capital gains rather than ordinary income.

10 During this period, Chase, Union Planters and U.S. Trust each wrote to UV concerning its plans with respect to its long-term debt. In response to a letter from a Chase officer dated March 26, UV replied on April 9 that the debentures "will be provided for in the liquidation

of Chase, Manufacturers and U.S. Trust met with UV officers and directors and collectively demanded that UV pay off all the debentures within 30 days or, alternatively, that UV establish a trust fund of $180 million to secure the debt. There was testimony that at least one of the Indenture Trustees threatened to sue to enjoin UV from paying the $18 liquidating distribution on the grounds that a liquidating distribution prior to payment of UV's debts would violate Maine law,[11] which provides, as to a liquidating corporation, that:

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according to the respective Indentures and the covenants therein." Immediately following UV's announcement on April 9 that the $18 distribution would be made on April 30, U.S. Trust and Union Planters each wrote to ask UV about the payment of the debt instruments. By letter of April 20, UV replied to Union Planters stating simply that "UV will contact the trustees at a future time, when it is prepared to advise the trustees as to the mechanics of honoring its commitments." An identical letter was sent to Chase; U.S. Trust never received a reply to its inquiry.

11 The Indenture Trustees apparently concede that as of the April 26 meeting that none of the Indentures was in default and that the forthcoming $18 distribution would not be a default under any of the indentures. Such an interpretation by the Trustees is evidenced by two letters written by Manufacturers and U.S. Trust, respectively, to debentureholders. The letter from Manufacturers to one of its debentureholders, dated June 22, 1979, states, in pertinent part:

> In our opinion and in the opinion of our counsel, neither the approval by stockholders [of UV] of the Plan of Liquidation and Dissolution, nor the initial liquidating dividend constitutes a default under the Indenture. Nor are we aware of any other act or omission on the part of UV which constitutes a default under the Indenture. Absent a default under the Indenture, neither the Trustee nor the Debentureholders can, in our opinion, require UV to call the Debentures or in any other way compel payment of the Debentures other than in accordance with the terms of the Debentures and of the Indenture.

A similar conclusion was expressed by U.S. Trust in a letter to a debentureholder dated June 13, 1979, which reads in part:

> We advise, as Trustee, less complete Liquidation and Dissolution, that nothing has come to our attention that caused us to believe that [UV] was not in compliance with any of the covenants or agreements of the governing Indenture.

> *After* paying or adequately providing for the payment of all its obligations, the corporation shall distribute the remainder of its assets . . . among its shareholders . . .

Me. Rev. Stat. Ann. Tit. 13-A, § 1106(4) (1971) (emphasis added).

The outcome of this meeting was an "Agreement for Treatment of Certain Obligations of UV Industries, Inc.," dated April 27, 1979, between UV and the Indenture Trustees ("April Document"). Under the April Document, UV agreed, *inter alia,* to set aside a cash fund of $155 million to secure its public debt and to present a proposal for the satisfaction and discharge of that debt to the Indenture Trustees within 90 days. The Indenture Trustees agreed not to seek an injunction against the payment of the $18 per share liquidating distribution. The April Document provided that all obligations thereunder would terminate upon the payment of UV's public debt or upon UV's abandonment of the plan of liquidation.

On July 23, 1979, UV announced that it had entered into an agreement for the sale of most of its oil and gas properties to Tenneco Oil Company for $135 million cash. The deal was consummated as of October 2, 1979 and resulted in a net gain of $105 million to UV.

3. *The Sale to Sharon Steel*

In November, 1979, Sharon proposed to buy UV's remaining assets. Another company, Reliance Group (unrelated to Reliance Electric), had made a similar offer. After a brief bidding contest, UV and Sharon entered into

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12 The $155 million fund created pursuant to the April Document is included in the $322 million of cash or equivalents transferred by UV to Sharon pursuant to the Purchase Agreement.

an "Agreement for Purchase of Assets" and an "Instrument of Assumption of Liabilities" on November 26, 1979. Under the purchase agreement, Sharon purchased all of the assets owned by UV on November 26 (*i.e.*, Mueller Brass, UV's mining properties and $322 million in cash or the equivalent) for $518 million ($411 million of Sharon subordinated debentures due in 2000—then valued at 86% or $353,460,000—plus $107 million in cash). Under the assumption agreement, Sharon assumed all of UV's liabilities, including the public debt issued under the indentures. UV thereupon announced that it had no further obligations under the indentures or lease guaranties, based upon the successor obligor clauses.

On December 6, 1979, in an attempt to formalize its position as successor obligor, Sharon delivered to the Indenture Trustees supplemental indentures executed by UV and Sharon. The Indenture Trustees refused to sign. Similarly, Sharon delivered an assumption of the lease guaranties to both Chase and Union Planters but those Indenture Trustees also refused to sign.

4. *The Proceedings in the District Court*

By letters dated December 24, 1979, Chase, U.S. Trust and Manufacturers issued virtually identical notices of default as a result of UV's purported assignment of its obligations to Sharon. Each demanded that the default be cured within 90 days or that the debentures be redeemed. Chase and U.S. Trust brought separate actions in New York County Supreme Court against UV and Sharon for redemption of the debentures; Manufacturers subsequently initiated a similar lawsuit. On December 26, 1979, Sharon initiated this action against Chase, U.S. Trust and Manufacturers. The state court actions have been stayed pending disposition of this case.

The amended complaint, in effect, raises five claims: (i) the April Document is of no force because it was procured by coercion and lacks consideration; (ii) the April Document expired upon Sharon's purchase of all UV's assets and assumption of UV's liabilities since it does not apply to a successor corporation; (iii) Manufacturers and Chase conspired to force UV and Sharon to redeem the debentures in violation of Section 1 of the Sherman Act; (iv) Manufacturers, Chase and U.S. Trust improperly refused to execute supplemental indentures, issued default notices and demanded immediate redemption of the debentures; and (v) Chase and Union Planters improperly refused to execute supplemental lease guaranties and demanded repayment of the debt. Chase, U.S. Trust and Manufacturers sought specific performance of the redemption provisions by counterclaim.

In February, 1980, Sharon announced that it intended to withdraw the entire $155 million fund established under the April Document. Chase, Manufacturers and U.S. Trust sought a preliminary injunction preventing any withdrawal and requiring Sharon to hold that fund in trust for the debentureholders. Sharon cross-moved to withdraw what it termed "excess security," that portion of the fund in excess of the aggregate amount of UV's public debt. By order dated March 5, 1980, the District Court denied the motion and cross-motion apparently because the $155 million Fund was on deposit with the Indenture Trustees. During the pendency of these motions, the Debentureholders sought leave to intervene to assert claims against UV and Sharon. The Court granted intervention and subsequently certified them as the representatives of all holders of such debentures pursuant to Fed. R. Civ. P. 23(b)(2).

During February and March, 1980, the Indenture Trustees and the Debentureholders moved for dismissal of Sharon's amended complaint and for summary judgment. In an opinion dated September 3, 1980, reported at 88 F.R.D. 38 (S.D.N.Y. 1980), the District Court denied these motions.

A jury trial was held during April and early May, 1981, at which Sharon submitted voluminous testimony and other evidence. The Indenture Trustees and Debentureholders moved for a directed verdict, and on May 11, 1981, the District Court granted the motion and dismissed Sharon's claims. The Indenture Trustees and Debentureholders subsequently moved for summary judgment on their claims and counterclaims, which was granted on June 2, 1981. A judgment encapsulating these determinations was filed on August 18, 1981.

The judgment orders: (i) dismissal with prejudice of Sharon's amended complaint; (ii) judgment in favor of the Indenture Trustees and Debentureholders on their claim that the debentures were due and payable; (iii) payment to the Debentureholders of an allocable share of the interest earned on the $155 million fund created pursuant to the April Document; (iv) an award of costs and expenses to the Indenture Trustees (including attorneys' fees); (v) an award of attorneys' fees and expenses to the Debentureholders to be paid out of the recovery; (vi) dismissal of the claims of the Indenture Trustees and the Debentureholders for a redemption premium; and (vii) impression of a constructive trust for the Debentureholders on the $155 million fund sufficient to satisfy the debt (plus $2 million as an estimate of costs) and remission of funds in excess of that amount to Sharon.

Sharon and the UV Defendants appeal various portions of judgment. The Indenture Trustees and Debenture-

holders cross-appeal from the denial of the redemption premium. The Debentureholders cross-appeal from the denial of legal fees and expenses to be paid by UV and Sharon, rather than from the class recovery.

DISCUSSION

1. *The Successor Obligor Clauses*

Sharon Steel argues that Judge Werker erred in not submitting to the jury issues going to the meaning of the successor obligor clauses. We disagree.

Successor obligor clauses are "boilerplate" or contractual provisions which are standard in a certain genre of contracts. Successor obligor clauses are thus found in virtually all indentures. Such boilerplate must be distinguished from contractual provisions which are peculiar to a particular indenture and must be given a consistent, uniform interpretation. As the American Bar Foundation *Commentaries on Indentures* (1971) ("*Commentaries*") state:

> Since there is seldom any difference in the intended meaning [boilerplate] provisions are susceptible of standardized expression. The use of standardized language can result in a better and quicker understanding of those provisions and a substantial saving of time not only for the draftsman but also for the parties and all others who must comply with or refer to the indenture, including governmental bodies whose approval or authorization of the issuance of the securities is required by law.

Id.

Boilerplate provisions are thus not the consequence of the relationship of particular borrowers and lenders and

do not depend upon particularized intentions of the parties to an indenture. There are no adjudicative facts relating to the parties to the litigation for a jury to find and the meaning of boilerplate provisions is, therefore, a matter of law rather than fact.

Moreover, uniformity in interpretation is important to the efficiency of capital markets. As the Fifth Circuit has stated:

> A large degree of uniformity in the language of debenture indentures is essential to the effective functioning of the financial markets: uniformity of the indentures that govern competing debenture issues is what makes it possible meaningfully to compare one debenture issue with another, focusing only on the business provisions of the issue (such as the interest rate, the maturity date, the redemption and sinking fund provisions in the conversion rate) and the economic conditions of the issuer, without being misled by peculiarities in the underlying instruments.

Broad v. Rockwell International Corp., 642 F.2d 929, 943 (5th Cir.), *cert. denied*, 102 S.Ct. 506 (1981). Whereas participants in the capital market can adjust their affairs according to a uniform interpretation, whether it be correct or not as an initial proposition, the creation of enduring uncertainties as to the meaning of boilerplate provisions would decrease the value of all debenture issues and greatly impair the efficient working of capital markets. Such uncertainties would vastly increase the risks and, therefore, the costs of borrowing with no offsetting benefits either in the capital market or in the administration of justice. Just such uncertainties would be created if interpretation of boilerplate provisions were submitted to juries sitting in every judicial district in the nation.

Sharon also argues that Judge Werker erred in rejecting evidence of custom and usage and practical construction as to the meaning of the successor obligor clauses. While custom or usage might in some circumstances create a fact question as to the interpretation of boilerplate provisions, the evidence actually offered by Sharon simply did not tend to prove a relevant custom or usage. Sharon's experts both conceded that so far as the meaning of successor obligor clauses and the language "all or substantially all" are concerned, the UV/Sharon transaction was unique. Their testimony was thus limited to use of such clauses and such language in very different contexts. Because context is of obvious and critical importance to the use of particular language, the testimony offered did not tend to prove or disprove a material fact.

Sharon's proffer of evidence as to practical construction also fails. At best, it amounted to a few statements over a two-week period by Indenture Trustees or debentureholders implying that a purchaser such as Sharon might become a successor obligor. Sharon's offer of proof falls woefully short of the kind of mutual understanding over a period of time which is necessary for practical construction to become relevant to interpretation. *Compare Gordon v. Vincent Yeomans, Inc.*, 358 F.2d 261, 264 (2d Cir. 1965); *Portsmouth Baseball Corp. v. Frick*, 278 F.2d 395, 400-02 (2d Cir.), *cert. denied* 364 U.S. 831 (1960). Particularly where boilerplate is concerned, a more deliberate and enduring course of conduct is necessary to utilize practical construction.

We turn now to the meaning of the successor obligor clauses. Interpretation of indenture provisions is a matter of basic contract law. As the *Commentaries* at 2 state:

> The second fundamental characteristic of long term debt financing is that the rights of holders of the debt

> securities are largely a matter of contract. There is no governing body of statutory or common law that protects the holder of unsecured debt securities against harmful acts by the debtor except in the most extreme situations . . . [T]he debt securityholder can do nothing to protect himself against actions of the borrower which jeopardize its ability to pay the debt unless he . . . establishes his rights through contractual provisions set forth in the . . . indenture.

Contract language is thus the starting point in the search for meaning and Sharon argues strenuously that the language of the successor obligor clauses clearly permits its assumption of UV's public debt. Sharon's argument is a masterpiece of simplicity: on November 26, 1979, it bought everything UV owned; therefore, the transaction was a "sale" of "all" UV's "assets." In Sharon's view, the contention of the Indenture Trustees and Debentureholders that proceeds from earlier sales in a predetermined plan of piecemeal liquidation may not be counted in determining whether a later sale involves "all assets" must be rejected because it imports a meaning not evident in the language.

Sharon's literalist approach simply proves too much. If proceeds from earlier piecemeal sales are "assets," then UV continued to own "all" its "assets" even after the Sharon transaction since the proceeds of that transaction, including the $107 million cash for cash "sale," went into the UV treasury. If the language is to be given the "literal" meaning attributed to it by Sharon, therefore, UV's "assets" were not "sold" on November 26 and the ensuing liquidation requires the redemption of the debentures by UV. Sharon's literal approach is thus self-defeating.

The words "all or substantially all" are used in a variety of statutory and contractual provisions relating to transfers of assets and have been given meaning in light of the particular context and evident purpose. *See Campbell v. Vose*, 515 F.2d 256 (10th Cir. 1975) (transfer of sole operating asset held to be a sale of all or substantially all of the corporation's assets even though two-thirds of asset book value in the form of bank balances, promissory notes and an investment portfolio was retained); *Atlas Tool Company v. Commissioner*, 80-1 U.S. T.C. (CCH) ¶ 9177, at 83,234 (3rd Cir. Jan. 28, 1980). ("Substantially all" requirement is chiefly determined by the transfer of operating assets). Sharon argues that such decisions are distinguishable because they serve the purpose of either shareholder protection or enforcement of the substance of the Internal Revenue Code. Even if such distinctions are valid, these cases nevertheless demonstrate that a literal reading of the words "all or substantially all" is not helpful apart from reference to the underlying purpose to be served. We turn, therefore, to that purpose.

Sharon argues that the sole purpose of successor obligor clauses is to leave the borrower free to merge, liquidate or to sell its assets in order to enter a wholly new business free of public debt and that they are not intended to offer any protection to lenders. On their face, however, they seem designed to protect lenders as well by assuring a degree of continuity of assets. Thus, a borrower which sells all its assets does not have an option to continue holding the debt. It must either assign the debt or pay it off. As the *Commentaries* state at 290:

> The decision to invest in the debt obligations of a corporation is based on the repayment potential of a business enterprise possessing specific financial

> characteristics. The ability of the enterprise to produce earnings often depends on particular assets which it owns. Obviously, if the enterprise is changed through consolidation with or merged into another corporation or through disposition of assets, the financial characteristics and repayment potential on which the lender relied may be altered adversely.

The single reported decision construing a successor obligor clause, *B.S.F. Company v. Philadelphia National Bank*, 204 A.2d 746 (Del. Sup. Ct. 1964), clearly held that one purpose of the clause was to insure that the principal operating assets of a borrower are available for satisfaction of the debt.

Sharon seeks to rebut such inferences by arguing that a number of transactions which seriously dilute the assets of a company are perfectly permissible under such clauses. For example, UV might merge with, or sell its assets to, a company which has a miniscule equity base and is debt heavy. They argue from these examples that the successor obligor clause was not intended to protect borrowers from the kind of transaction in which UV and Sharon engaged.

We disagree. In fact, a substantial degree of protection against diluting transactions exists for the lender. Lenders can rely, for example, on the self-interest of equityholders for protection against mergers which result in a firm with a substantially greater danger of insolvency. So far as the sale of assets to such a firm is concerned, that can occur but substantial protection exists even there since the more debt heavy the purchaser, the less likely it is that the seller's equityholders would accept anything but cash for the assets. A sale to a truly crippled firm is thus unlikely given the self-interest of the equityholders. After a sale, moreover, the lenders would continue to have the protec-

tion of the original assets. In both mergers and sales, complete protection against an increase in the borrower's risk is not available in the absence of more specific restrictions, but the self-interest of equityholders imposes a real and substantial limit to that increase in risk. The failure of successor obligor clauses to provide even more protection hardly permits an inference that they are designed solely for the benefit of borrowers.

Sharon poses hypotheticals closer to home in the hope of demonstrating that successor obligor clauses protect only borrowers: *e.g.*, a transaction involving a sale of Federal and the oil and gas properties in the regular course of UV's business followed by an $18 per share distribution to shareholders after which the assets are sold to Sharon and Sharon assumes the indenture obligations. To the extent that a decision to sell off some properties is not part of an overall scheme to liquidate and is made in the regular course of business it is considerably different from a plan of piecemeal liquidation, whether or not followed by independent and subsequent decisions to sell off the rest. A sale in the absence of a plan to liquidate is undertaken because the directors expect the sale to strengthen the corporation as a going concern. A plan of liquidation, however, may be undertaken solely because of the financial needs and opportunities or the tax status of the major shareholders. In the latter case, relatively quick sales may be at low prices or may break up profitable asset combinations, thus drastically increasing the lender's risks if the last sale assigns the public debt. In this case, for example, tax considerations compelled completion of the liquidation within 12 months. The fact that piecemeal sales in the regular course of business are permitted thus does not demonstrate that successor obli-

gor clauses apply to piecemeal liquidations, allowing the buyer last in time to assume the entire public debt.

We hold, therefore, that protection for borrowers as well as for lenders may be fairly inferred from the nature of successor obligor clauses. The former are enabled to sell entire businesses and liquidate, to consolidate or merge with another corporation, or to liquidate their operating assets and enter a new field free of the public debt. Lenders, on the other hand, are assured a degree of continuity of assets.

Where contractual language seems designed to protect the interests of both parties and where conflicting interpretations are argued, the contract should be construed to sacrifice the principal interests of each party as little as possible. An interpretation which sacrifices a major interest of one of the parties while furthering only a marginal interest of the other should be rejected in favor of an interpretation which sacrifices marginal interests of both paties in order to protect their major concerns.

Of the contending positions, we believe that of the Indenture Trustees and Debentureholders best accommodates the principal interests of corporate borrowers and their lenders. Even if the UV/Sharon transaction is held not to be covered by the successor obligor clauses, borrowers are free to merge, consolidate or dispose of the operating assets of the business. Accepting Sharon's position, however, would severely impair the interests of lenders. Sharon's view would allow a borrowing corporation to engage in a piecemeal sale of assets, with concurrent liquidating dividends to that point at which the asset restrictions of an indenture prohibited further distribution. A sale of "all or substantially all" of the remaining assets could then be consummated, a new debtor substi-

tuted, and the liquidation of the borrower completed. The assignment of the public debt might thus be accomplished, even though the last sale might be nothing more than a cash for cash transaction in which the buyer purchases the public indebtedness. The UV/Sharon transaction is not so extreme, but the sale price paid by Sharon did include a cash for cash exchange of $107 million. Twenty-three percent of the sale price was, in fact, an exchange of dollars for dollars. Such a transaction diminishes the protection for lenders in order to facilitate deals with little functional significance other than substituting a new debtor in order to profit on a debenture's low interest rate. We hold, therefore, that boilerplate successor obligor clauses do not permit assignment of the public debt to another party in the course of a liquidation unless "all or substantially all" of the assets of the company at the time the plan of liquidation is determined upon are transferred to a single purchaser.

The application of this rule to the present case is not difficult. The plan of liquidation was approved by UV's shareholders on March 26, 1978. Since the Indenture Trustees make no claim as to an earlier time, *e.g.*, the date of the Board recommendation, we accept March 26 as the appropriate reference date. The question then is whether "all or substantially all" of the assets held by UV on that date were transferred to Sharon. That is easily answered. The assets owned by UV on March 26 and later transferred to Sharon were Mueller Brass, certain metals mining property, and substantial amounts of cash and other liquid assets. UV's Form 10-K and Sharon's Form S-7 state that Mueller Brass and the metals mining properties were responsible for only 38% of UV's 1978 operating revenues and 13% of its operating profits. They constitute 41% of the book value of UV's operating

properites. When the cash and other liquid assets are added, the transaction still involved only 51% of the book value of UV's total assets.

Since we do not regard the question in this case as even close, we need not determine how the substantiality of corporate assets is to be measured, what percentage meets the "all or substantially all" test or what role a jury might play in determining those issues. Even when the liquid assets (other than proceeds from the sale of Federal and the oil and gas properties) are aggregated with the operating properties, the transfer to Sharon accounted for only 51% of the total book value of UV's assets. In no sense, therefore, are they "all or substantially all" of those assets. The successor obligor clauses are, therefore, not applicable. UV is thus in default on the indentures and the debentures are due and payable. For that reason, we need not reach the question whether the April Document was breached by UV.

2. *The Anti-Trust Claim*

Sharon's anti-trust claims border on the frivolous. While there can be little question that the Indenture Trustees engaged in concerted activity, Sharon has not shown any anti-competitive purpose or effect injurious to consumer welfare. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). The Indenture Trustees were faced with a common breach of the indenture agreements by UV and their seeking to arrive at, and arriving at, a common position as to that breach is not anti-competitive.

Joint activity by creditors facing a debtor is commonly in the interests of all parties. *Falstaff Brewing Corp. v. New York Life Insurance Company*, 513 F.Supp. 289 (N.D. Cal. 1978). If creditors were forced to act individually, each would be compelled to resort to the most

extreme action available in order to protect its individual interest. Such an action, however, might well drive the debtor out of business thereby eliminating any opportunity for it to work out of present difficulties and ultimately satisfy the debts. Mutual forebearance by creditors, therefore, may be in the interests of both debtors and creditors in that it maximizes repayment and gives the debtor a chance of survival. That it entails concerted activity by the creditors does not mean, however, that consumers are injured. To the contrary, by reducing both losses to creditors and the transaction costs resulting from bankruptcy, such activity reduces the costs of borrowing and the costs of doing business, all of which is to the consumer's advantage.

While the present case does not involve an insolvent corporation, the same considerations apply. Indenture Trustees do not have power to compromise with the borrower or to vary the terms of the indenture. Kennedy and Landau, *Corporate Trust* 227 (2d ed. 1975). They are, moreover, bound to enforce the indentures. At the time that the concerted activity in this case began, UV's Board had approved a liquidating plan which was wholly imprecise as to when or how UV's public debt was to be satisfied. The Indenture Trustees had, as one option, a perfectly plausible action under Maine's Section 1106 to enjoin the April 30 liquidating distribution. As a practical matter, had the Trustees not conferred and acted in concert, each would have been under pressure to follow the lead of that trustee which sought the most extreme remedy. For a Trustee to do otherwise would risk litigation against it by debentureholders claiming that it had failed to pursue appropriate legal actions. For all of UV's current enthusiasm about dealing with the Trustees individually, it was in its interest at the time to deal with them

jointly. Had any Trustee concluded that its debenture-holders were faring less well in the negotiations than others, it would surely have resorted to an action under Section 1106. Independent negotiaions would thus have inevitably led to an action by at least one trustee to enjoin the initial liquidating distribution. Once one suit had begun, others would have followed unless UV paid off the debentures. The April Document avoided this result by creating a fund intended to comply with Section 1106. Such an agreement could not have been reached other than through collective negotiations with the Indenture Trustees. Indeed, that a joint agreement was preferable to litigation so far as UV is concerned is underlined by Sharon's present (and unpersuasive) contention that the April Document is invalid because UV was coerced by the threat of just such litigation.

We conclude, therefore, no anti-competitive purpose or effect in such concerted activity by the indenture trustees. By allowing the parties to various indentures to seek compromise arrangements avoiding resort to litigation while protecting all concerned, such collective activity reduces the costs of indenture enforcement and the costs of borrowing. *Broadcast Music, Inc.* 441 U.S. at 1563. UV was in no way foreclosed from the capital market or otherwise deprived of the benefits of free competition.

3. *The Redemption Premium*

Judge Werker held that the redemption premium under the indentures need not be paid by UV. His reasoning was essentially that UV defaulted under the indenture agreement and that the default provisions provide for acceleration rather than a redemption premium. We do not agree. The acceleration provisions of the indentures are explicitly permissive and not exclusive of other remedies. We

see no bar, therefore, to the Indenture Trustees seeking specific performance of the redemption provisions where the debtor causes the debentures to become due and payable by its voluntary actions.

This is not a case in which a debtor finds itself unable to make required payments. The default here stemmed from the plan of voluntary liquidation approved on March 26, 1979, followed by the unsuccessful attempt to invoke the successor obligor clauses. The purpose of a redemption premium is to put a price upon the voluntary satisfaction of a debt before the date of maturity. While such premiums may seem largely irrelevant for commercial purposes in times of high interest rates, they nevertheless are part of the contract and would apply in a voluntary liquidation which included plans for payment and satisfaction of the public debt. We believe it undermines the plain purpose of the redemption provisions to allow a liquidating debtor to avoid their terms simply by failing to take the steps necessary to redeem the debentures, thereby creating a default. We hold, therefore, that the redemption premium must be paid. *See Hamichell v. Omaha Water Co.*, 146 A.D. 693 (1st Dep't. 1911), *aff'd*, 208 N.Y. 520 (1913).

4. *Restitution*

Judge Werker also held that all UV's debentureholders were entitled to the interest earned on the fund established under the April Document from the date on which he found that agreement breached. This recovery is not based on any contract with UV. The indentures do not provide for the payment of such additional interest in the event of default. Nor is there anything in the April Document entitling the debentureholders to interest earned on this fund which was set aside as security for the

amounts due, including accrued interest, under the debentures.

The District Court's decision also cannot be sustained on the basis of general equitable principles. It is not unjust enrichment to earn interest on a sum which is the subject of future or pending litigation absent contractual provisions directing otherwise. Moreover, Sharon's and UV's pursuit of this litigation is not such an abuse of process as to call for an extraordinary award to its adversaries. While we are not impressed by their arguments, we certainly are not prepared to say that their claims as to the meaning of the successor obligor clause were wholly frivolous. *Compare Bankers Trust Co. v. Publicker Industries, Inc.*, 641 F.2d 1361, 1367 (2d Cir. 1981). We, therefore, reverse the award of interest earned on the fund over and above the amount of accrued interest due under the debentures.

5. *Attorney's Fees*

Judge Werker granted attorney's fees and expenses to the Debentureholders to be recovered out of the common fund secured for the class they have represented. The Debentureholders argue that Sharon Steel should be made to pay those fees and expenses. Noting that the debentures specifically provide for payment of attorney's fees and expenses only for litigation brought by the Indenture Trustees, we affirm this ruling on Judge Werker's opinion.

CONCLUSION

We affirm Judge Werker's dismissal of Sharon's amended complaint and award of judgment to the Indenture Trustees and Debentureholders on their claim that

the debentures are due and payable. We reverse his dismissal of the claim for payment of the redemption premium and his award of the interest earned on the $155 million Fund. We affirm his granting of attorney's fees and expenses to the Debentureholders out of the judgment recovered. The Indenture Trustees shall be awarded their full costs. The Debentureholders shall be awarded one-half their costs.

Opinion of Werker, D.J.
dated May 11, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHARON STEEL CORPORATION,
Plaintiff,

—v.—

The CHASE MANHATTAN BANK, N.A., Manufacturers Hanover Trust Company and United States Trust Company of New York,
Defendants.

MANUFACTURERS HANOVER TRUST COMPANY,
Third-Party Plaintiff,

—v.—

UV INDUSTRIES, INC.,
Third-Party Defendant.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, et al.,
Intervenors,

—v.—

SHARON STEEL CORPORATION,
Plaintiff,

—and—

UV Industries, Inc.,
Third-Party Defendant.

UNION PLANTERS NATIONAL BANK OF MEMPHIS, as Trustee,
Plaintiff,

—v.—

UV INDUSTRIES, INC. and David Finkelstein, Arthur R. Gralla, Martin Horwitz, Edwin Jacobson, Theodore W. Kheel, and Paul Kolton, as Trustees of the UV Industries, Inc. Liquidating Trust, Defendants,

—and—

Sharon Steel Corporation,
Defendant.

Nos. 79 Civ. 6996 (HFW), 80 Civ. 5341 (HFW).

United States District Court,
S. D. New York

May 11, 1981.

OPINION

WERKER, District Judge.

Plaintiff, Sharon Steel Corporation ("Sharon"), commenced this action against defendants, The Chase Manhattan Bank, N.A. ("Chase"), Manufacturers Hanover Trust Company ("Manufacturers"), and United States Trust Company of New

York ("U.S. Trust").[1] Manufacturers impleaded UV Industries as a third-party defendant, and the holders of certain UV debentures (the "Intervenors") intervened, asserting claims against both Sharon and UV. Union Planters National Bank of Memphis ("Union Planters") subsequently commenced a separate action against UV, the Trustees of the UV Industries, Inc. Liquidating Trust, and Sharon Steel Corporation. The Union Planters suit has been consolidated with the main action for all purposes.

This action having been tried before a jury on April 21-24, April 27-30, and May 4-6, 1981, and plaintiff having completed the presentation of its evidence, Chase, Manufacturers, the Intervenors and Union Planters have moved for a directed verdict pursuant to Fed. R. Civ. P. 50(a), on the ground that plaintiff has failed to establish a prima facie case as to any of its eight causes of action and that all its claims can be decided as a matter of law. Without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, I find that there is but one conclusion that can be reached with respect to each of plaintiff's claims. Accordingly, I grant the motion for a directed verdict as a matter of law and dismiss the complaint. In so ruling, I have viewed the evidence in plaintiff's favor to the extent possible and have given the plaintiff the benefit of all inferences which reasonably could be drawn from the evidence. *See Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 321 (2d Cir. 1978). I now enter this opinion in support of this disposition. The relevant facts follow.

Between 1965 and 1977, UV borrowed certain sums of money pursuant to five separate indentures (the "Indentures"). Two indentures involved Chase as trustee, and the remaining three involved Manufacturers, Union Planters and U.S. Trust as trustees.

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1 All claims and counterclaims pending between and among Sharon, UV and U.S. Trust were dismissed with prejudice pursuant to stipulation of the parties on May 11, 1981. Because the caption of the action has not yet been amended to reflect this, U.S. Trust must continue as a named defendant. Despite the settlement, reference to U.S. Trust in the course of this opinion was necessary for full development of the facts.

The Manufacturers Indenture was issued pursuant to an indenture dated April 15, 1977. Under this indenture, UV borrowed approximately $75,000,000 by issuing 8-7/8% debentures due 1982-1998. Approximately $66,775,000 principal amount of these debentures is still outstanding.

The U.S. Trust Indenture was issued pursuant to an indenture dated as of April 15, 1977. Under this indenture, UV borrowed approximately $25,000,000 by issuing 9-1/4% senior subordinated notes due 1987. Approximately $15,035,000 principal amount of these notes is still outstanding.

The first Chase Indenture was issued pursuant to an indenture dated as of September 1, 1965. Under this indenture, UV borrowed approximately $23,000,000 by issuing 5-3/8% subordinated debentures due 1979-1995. Approximately $13,669,900 principal amount of these debentures is still outstanding.

The second Chase Indenture was issued pursuant to an indenture dated as of December 1, 1968. Under this indenture, the City of Port Huron, Michigan borrowed approximately $22,000,000 by issuing Industrial Development Revenue Bonds which bear interest at the rate of 6-1/4% due 1993. Approximately $16,550,000 principal amount of these debentures is still outstanding.

The Union Planters Indenture was issued pursuant to an indenture dated as of November 12, 1968. Under this indenture, The County of Itawamba, Mississippi borrowed approximately $13,000,000 by issuing Industrial Revenue Bonds due 1993. Approximately $10,270,000 principal amount of the bonds is still outstanding.

The municipalities that were parties to the second Chase Indenture and the Union Planters Indenture issued the bonds for the purpose of acquiring and constructing premises which were to be and were leased to Mueller Brass Company ("Mueller"), a wholly-owned subsidiary of UV. Mueller's rent payments to each of the municipalities were to be used to pay the principal and interest on the bonds. UV executed Lease Guaranty Agreements (the "Lease Guaranties"), in connection with these leases, guaranteeing unconditionally the payment of all amounts due under the leases.

Each indenture provides in essence that in the event that UV merges or consolidates with another corporation or sells "all or substantially all" of its assets to another corporation, the successor corporation is entitled to succeed to UV's rights and obligations under the indenture. In addition, the Lease Guaranties provide that in the event of a sale of "all or substantially all" of UV's property to another corporation, the purchaser must assume in writing all of UV's obligations thereunder.

On December 19, 1978, UV publicly announced that it planned to sell one of its wholly-owned subsidiaries, Federal Pacific Electric Company ("Federal") and on January 19, 1979, UV publicly announced that it planned to liquidate. On February 20, 1979, UV distributed a proxy statement to all UV stockholders recommending approval of the sale of Federal to a subsidiary of Reliance Electric Company ("Reliance") for $345,000,000. The proxy statement also set forth and recommended a Plan of Liquidation and Dissolution (the "Liquidation Plan"), pursuant to which the assets of UV were to be sold over a 12-month period, with the proceeds or unsold assets to be distributed to shareholders after payment of or provision for UV's obligations. The Liquidation Plan required "that at all times there be retained an amount of cash and other assets which the Board deems necessary to pay, or provide for the payment of, all of the liabilities, claims and other obligations . . ." of UV. The proxy statement also stated that if both the sale of Federal and the Liquidation Plan were approved, there would be an initial liquidating distribution of $18 per share to the holders of UV common stock. On February 21, 1979, UV announced that it had scheduled a special meeting for March 26, 1979 at which time its shareholders' would vote on the plan to sell Federal as well as the Liquidation Plan.

At the special meeting on March 26, UV's shareholders approved the sale of Federal and the adoption of the Liquidation Plan. Thereupon, UV entered into a plan of voluntary liquidation and dissolution. The following day, UV, a Maine corporation, filed its Statement of Intent to Dissolve with the State of Maine.

On March 29, 1979, UV sold Federal to a subsidiary of Reliance Electric Company for $345,000,000 in cash. On April 9, 1979, UV announced that it would make the previously planned liquidating distribution of $18 per share to its common stockholders on April 30, 1979.

Although the Trustees had been aware of UV's plan to sell Federal and make the liquidating distribution since at least February 20, 1979, they made no attempt to block the planned distribution until April 26, 1979, the eve of the last business day before the distribution was to occur. On April 26, representatives of Chase, Manufacturers and U.S. Trust met with UV representatives. At least one of the banks threatened to commence litigation to enjoin the distribution unless UV immediately paid the bondholders whom the banks as indenture trustees represented.

The outcome of the meeting was embodied in a document entitled "Agreement for Treatment of Certain Obligations of UV Industries, Inc." (the "April Document"), dated April 27, 1979, which provided that UV would deposit with certain banks an aggregate amount of $155,000,000 in cash or cash equivalents to cover all its public indebtedness. The April Document also provided that within 90 days, UV would present to the indenture trustees a proposal for the payment of its Indebtedness and for satisfaction and discharge of UV's obligations under the Indentures. The April Document further stated that UV and the trustees entered into the April Document for good and valuable consideration, and in executing the April Document, the signatory Indenture Trustees agreed not to seek a court injunction against the $18 per share liquidating distribution. UV thereafter deposited the $155,000,000 in the special fund and proceeded to distribute a total of about $274,000,000 to its stockholders on April 30, 1979.

On July 23, 1979, UV announced that it had entered into an agreement for the sale of most of its oil and gas properties to Tenneco Oil Company ("Tenneco") for 135,000,000 cash. This sale was consummated on October 2, 1979.

On November 26, 1979, Sharon and UV entered into an agreement entitled "Agreement for Purchase of Assets" ("Pur-

chase Agreement") and "Instrument of Assumption of Liabilities" ("Assumption Instrument"). Under these agreements Sharon agreed to buy UV's assets and assume UV's liabilities.

Under the Purchase Agreement, all of the assets owned by UV on November 26, 1979 were purchased by Sharon. Under the Assumption Instrument, Sharon assumed all of UV's liabilities, with exceptions not relevant here, including UV's liabilities under the Indentures. Before November 26, 1979, UV or its subsidiary Mueller Brass timely made all payments of semi-annual interest, all sinking fund payments and all rent payments required by the Indentures, leases or Lease Guaranties.

In accordance with the successor obligor sections of the Indentures providing for the execution and delivery to the defendant trustees of Supplemental Indentures upon the sale of all or substantially all of UV's assets to another corporation, Sharon delivered on December 6, 1979 to each of the trustees a First Supplemental Indenture executed by Sharon and UV, along with other documents required by the Indentures. The defendants have refused to execute the supplemental indentures, but Sharon nevertheless has continued to make all payments of principal and interest required under the Indentures. On December 31, 1979, Sharon delivered an Assumption of Lease Guaranty to Chase and Union Planters but they also have refused to sign them.

By letters dated December 24, 1979 Chase, U.S. Trust and Manufacturers delivered to Sharon and UV virtually identical notices stating that UV's sale of assets to Sharon constituted a default under the Indentures. None of the notices referred to any event other than the sale of UV's assets to Sharon as a basis for default. On the same day, Chase and U.S. Trust commenced virtually identical actions against Sharon and UV in New York Supreme Court. Manufacturers subsequently filed a similar suit against both Sharon and UV in New York Supreme Court on March 21, 1980. Union Planters issued a notice of default on July 24, 1980, and commenced suit in this court on September 19, 1980.

The amended complaint sets forth eight[2] causes of action. In essence, five claims are presented. The first and second are that the April Document is of no force and effect because UV was coerced into entering into the agreement and because there was a failure of consideration flowing to UV. Sharon's third claim is that when it purchased all UV's assets and assumed all UV's liabilities, the April Document expired and became inapplicable because it was never intended to apply and cannot, as a matter of law apply to a successor corporation as defined in the Indentures. Sharon's fourth claim is that Manufacturers and Chase have engaged in an unlawful conspiracy in restraint of interstate trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Sharon also has asserted these claims against the Intervenors and Union Planters, arguing that Manufacturers was the Intervenor's agent and that Manufacturers, Chase and U.S. Trust acted as agents for Union Planters. Finally, Sharon claims that Chase and Manufacturers with respect to the 5-3/8% and 8-7/8% debentures respectively have improperly, wrongfully and unreasonably (a) refused to execute supplemental indentures, (b) issued notices of default, and (c) seek immediate payment of the debentures. Sharon contends that as a consequence of these wrongful acts, it has been deprived of an agreement to which it is lawfully entitled. Sharon asserts against the Intervenors the same claim asserted against Manufacturers on the basis of the alleged agency relationship between Manufacturers and the Intervenors. In addition, Sharon contends that Chase and Union Planters have wrongfully and unreasonably (a) issued notices of default under their respective lease guaranties and (b) seek immediate repayment of the bonds issued pursuant to the City of Port Huron and County of Itawamba Indentures.

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2 The amended complaint originally contained nine causes of action. Sharon withdrew this claim at the commencement of trial.

The Coercion Claim

Sharon contends that UV was coerced into executing the April Document and that therefore, the document is null, void, and unenforceable against Sharon and UV. The heart of plaintiff's position with respect to this claim is that the defendants, although they had known about the planned liquidating distribution scheduled for April 30, 1979 for over two months, waited until the eve of the distribution, and then improperly threatened to impede the distribution unless UV agreed to make certain undertakings with respect to its public debt. According to Sharon, Chase, U.S. Trust, and Manufacturers jointly pursued this conduct despite the statement in UV's Liquidation Plan that it would retain sufficient cash to pay or make provision for its debts, as required by Maine law at all times during the term of the Plan.

> The modern doctrine of economic duress . . . [e]ven in its furthest extension . . . has not been applied to a threat of process or suit, not otherwise oppressive, limited to the subject matter of the agreement, attacked for duress . . . . Nor should the rule be extended to threats to employ process or exercise rights, not otherwise disproportionate or clearly oppressive, available to the promisee with respect to the subject matter proper. It would make little sense to inhibit the promisee from claiming or enforcing his just due. The vice arises only when he employs extortive measures, or when lacking good faith, he makes improper demands. This occurs when his demands are made with respect to matters in which he has no rightful claim,—or a doubtful claim,—or a claim insignificant when contrasted with the demands.

Oleet v. Pennsylvania Exchange Bank, 285 App.Div. 411, 415, 137 N.Y.S.2d 779, 783 (1st Dep't 1955); *see Gerstein v. 532 Broad Hollow Road Co.*, 75 App.Div.2d 292, 429 N.Y.S.2d 195 (1st Dep't 1980).

In this case, it cannot be said that the threat of litigation to block the liquidating distribution was made with respect to

matters concerning which the trustees had no rightful claim or a doubtful claim. UV had entered upon a Plan of Liquidation and Dissolution, triggering the provisions of Maine law.

The relevant Maine statute provides:

> After paying or adequately providing for the payment of all its obligations, the corporation shall distribute the remainder of its assets, either in cash or in kind, among its shareholders according to their respective rights and interests.

13A Me.Rev.Stat. § 1106.4.

Whether or not the Trustees interpretation of the statute ultimately would be borne out, there certainly was a substantial basis upon which they could assert the claims threatened. The fact that the Trustees owed the highest fiduciary duty to the bondholders further negates any suggestion of bad faith on the part of the trustees in threatening litigation for they were obligated to act to protect the interests of the bondholders. In addition, the claims of the bondholders were not insignificant as compared to their demands and the underlying situation. UV was about to make a liquidating distribution in the amount of approximately $274,000,000, while the bondholders were owed over 100 million dollars. This clearly posed a serious threat to the position of the bondholders and the Trustees were entitled to resort to legal process to insure that UV would in fact retain sufficient funds to repay them.

Sharon nevertheless claims that the Trustees knew that UV had planned to keep sufficient funds available for the repayment of its debts. The evidence presented at trial simply did not bear this out. Rather, the evidence showed that the trustee banks were concerned about the position of the bondholders upon hearing about the proposed distribution and had inquired of UV as to its plans with respect to its public debt. These inquiries were unavailing, however, and UV's response, if one was given at all, was the mere statement that it would provide for its debt. In view of the fiduciary position of the trustees this clearly was an inadequate response. Furthermore, the evidence showed that UV was represented by two law firms at

the April meeting and that its President, Edwin Jacobson signed the document only after conferring with Martin Horwitz, UV's Chief Executive Officer, and counsel. Thus, UV chose to sign the agreement in order to avoid the inconvenience of delaying the distribution while the bondholders sought adjudication of their rights in court. Merely because subsequent events have made it desirable for UV and Sharon to avoid the obligations of this agreement does not render the agreement coercive on the date on which it was executed.

In addition, "under New York law, a contract entered into under duress is generally considered not void, but voidable, and one who would repudiate a contract procured by duress must act promptly or will be deemed to have elected to affirm it." *Scientific Holding Co. v. Plessey Inc.*, 510 F.2d 15 (1974) (citations omitted); *see, e.g., Bethlehem Steel Corp. v. Solow*, 63 App. Div.2d 292, 405 N.Y.S.2d 80 (1st Dep't 1978); *Levine v. Levy*, 285 App. Div. 848, 136 N.Y.S.2d 695 (4th Dep't) (per curiam), *appeal denied*, 285 App. Div. 1011, 139 N.Y.S.2d 297 (1955); *Port Chester Electrical Construction Corp. v. Hastings*, 284 App. Div. 966, 134 N.Y.S.2d 656 (2d Dep't 1954); 13 *Williston on Contracts* § 1624 (1970). This UV did not do. From the date on which the agreement was signed until at least November, 1979, UV complied with the April Agreement to the extent that it established the $155,000,000 Fund and presented a proposal to the trustees within the ninety day period required by the agreement. At no time during the more than six month period between the creation of the April Document and UV's sale of assets to Sharon did UV disaffirm the agreement or seek to have it set aside.

Thus, Sharon has failed completely to establish a *prima facie* case of coercion and judgment as a matter of law is rendered in favor of Chase, Manufacturers, the Intervenors and Union Planters on this claim.

The Failure of Consideration Claim

Sharon's next claim is that the April Document is unenforceable against Sharon and UV because there was a lack of

consideration flowing to UV. Under New York law, forbearance to assert a colorable legal claim constitutes sufficient consideration to support a contract so long as the promise of forbearance is absolute and for a definite time. *See Strong v. Sheffield*, 144 N.Y. 392, 39 N.E. 330 (1894); *White v. Hoyt*, 73 N.Y. 505 (1878); *Hyde v. Lipiec*, 12 Misc. 2d 107, 173 N.Y.S.2d 901 (Sup.Ct. Erie County 1958).

In this case, I already have determined that there was a substantial basis in law upon which the trustees could assert their claims for injunctive relief and that their claims were made in good faith. Therefore, the only question is whether the promise of forebearance was absolute and for a definite time.

The April Document states that "this Agreement has been entered into by the parties . . . for good and valuable consideration receipt of which is hereby acknowledged." Joint Ex. 21. Nevertheless, the understanding of the parties with respect to what this consideration was is not set forth in the Document. Therefore, in order to ascertain the full and complete understanding of the parties with respect to consideration, it is necessary to look to extrinsic evidence of their intent. *See generally* J. Calamari and J. Perillo, *The Law of Contracts* § 3-2, p. 99. The most satisfactory evidence on this issue is agreed finding of fact No. 16. It states:

> The April Document states that UV and the signatory Indenture Trustees entered into the April Document in exchange for good and valuable consideration, and in executing the April Document the signatory Indenture Trustees agreed not to seek a court injunction against the $18 per share distribution of April 30, 1979.

Based upon the foregoing, the only conclusion that can be reached is that the trustees agreed to forbear from suing to block the April 30th liquidating distribution, a lawsuit which they clearly were entitled to institute. This agreed for forbearance enabled UV to proceed with the distribution, on April 30, 1979. There is no question that UV took advantage of this right. Consequently, I find as a matter of law that there was valid consideration flowing to UV under the April Agreement.

The Expiration of the April Agreement Claim

Sharon's next claim is that even if the April Document was at one time valid, it no longer has any force and effect and is unenforceable against Sharon or UV. According to Sharon, when it purchased all the assets UV had on November 26, 1979 and assumed its obligations, including its obligations under the Indentures and the Lease Guaranties, the April Document expired and became inapplicable, because its provisions never were intended to apply to the situation in which "all or substantially all" of UV's assets were purchased by a single corporation that was willing and able to pay off UV's public indebtedness.

I find this claim untenable for the reason that the April Document specifically limits the circumstances in which the Agreement could be terminated by UV. The April Document provides:

> This Agreement may be terminated by [UV] and be of no further force and effect upon written notice by [UV] to the Corporate Trustees given at the time of the earlier to occur of the following: (i) the date on which the Plan of Liquidation and Dissolution is abandoned or terminated, provided the Company shall not be in default on such date under any of the above-described Indentures; and (ii) the date on which payment of all the Public Indebtedness shall have been made and all of the above-described Indentures shall have been satisfied and discharged.

Although it is true that at the time UV commenced liquidation, it was not contemplated that any single purchaser would or could be found who would buy all or substantially all of UV's assets and assume UV's liabilities and obligations, plaintiff has failed to present evidence from which it can be inferred that the sale of "all" of UV's assets to another corporation while it was still in liquidation would alter the requirements of the agreement. The primary concern of the trustees in seeking the agreement was to insure that UV would retain sufficient

capital to pay for its public debt in the event that it liquidated. This is evidenced by the fact that the only other provision for termination of the Agreement other than payment was abandonment of the liquidation. Because UV has in fact liquidated, it is irrelevant that another corporation was willing to assume UV's public debts.

The Indenture Claims

Sharon claims that it has purchased "all or substantially all" the property of UV and has fulfilled all requirements with respect to Sharon's assumption of UV's obligations under the Indentures, including delivery of proper Supplemental Indentures to the trustee banks. Sharon contends that it therefore was and is entitled to be recognized as a successor obligor under the Indentures, that Chase and Manufacturers have wrongfully refused to execute the tendered Supplemental Indentures, and have improperly issued notices of default and seek immediate payment of the debentures. Essentially the same claims are set forth with respect to the Lease Guaranties.

Chase, Manufacturers, the Intervenors and Union Planters contend that Sharon did not purchase all or substantially all of the property of UV. The resolution of this issue turns on a determination of the date that should be utilized for measuring UV's assets. The banks and the Intervenors argue that the date of measurement should be the date on which UV commenced its liquidation, March 26, 1979. Sharon, on the other hand, contends that the measuring date should be the date of its purchase of UV's assets, November 26, 1979.

In an opinion dated September 3, 1980, this Court found that Sharon had raised genuine issues of fact as to the meaning of the disputed language of the Indentures and the intent of the parties with respect to its interpretation. Consequently, I held that Sharon had a right to present extrinsic evidence to aid in interpreting the provisions.

The evidence presented on Sharon's direct case demonstrated that the meaning of this language simply was not discussed when the terms of the various indentures were being

negotiated. *See, e.g.*, Tr. at 235-36. Rather, they were boilerplate provisions that are universally included in the Indentures. *See, e.g.*, Tr. at 1093-95. Thus, there has been no evidence as to the parties' intent in incorporating these provisions in the Indentures.

Sharon, however, has come forward with evidence of custom and usage as the meaning normally accorded these terms in the financial community. According to Sharon's experts George D. Gibson and Graham Humes, the custom and usage with respect to the time at which the assets of a corporation are measured under the "all or substantially all" provision of an indenture is the date of purchase. Tr. at 1089, 1127. Nevertheless, neither expert was aware of a situation involving the same characteristics and sequence of events as those involved in the UV liquidation. Tr. at 1109-10, 1153.

I find that Sharon has failed to establish a *prima facie* case with respect to its claim that it is entitled to be recognized as a successor obligor under the Indentures. Sharon's evidence as to custom and usage simply does not support its claim for the reason that there is no custom and usage with respect to the meaning of "all or substantially all" the property of a liquidating corporation with public debt that has sold major assets and then sold its remaining assets to another corporation which seeks to become a successor obligor.

Because of the dearth of extrinsic evidence bearing on the interpretation of the contract term in issue, I find that no question has been presented and the issue must be decided as a matter of law. *See O'Brien v. Grumman Corp.*, 475 F. Supp. 284 (S.D.N.Y. 1979). *See generally Meyers v. Selznick Corp.*, 373 F.2d 21[illegible] (2d Cir. 1966). Furthermore, in view of the boilerplate character of the provision, I find that this is a particularly appropriate instance in which to rule as a matter of law. Indeed, "there is a significant likelihood . . . that different juries, construing identical indentures in an attempt to derive 'the intent of the parties would reach different conclusions. This would . . . be anomalous, since the principal goal of using boilerplate language in such contracts is that there be uniform construction of those provisions." *Broad v. Rockwell*

International Co., 642 F.2d 929, at 947, slip op. at 6136 n.20 (5th Cir. April 17, 1981) (en banc).

"[What particular language of a contract means . . . is to be answered in terms of what the parties were intending to guard against or to insure." *B.S.F. Co. v. Philadelphia National Bank*, 42 Del. Ch. 106, 204 A.2d 746, 750 (Del. Sup. 1964); *see Cromwell Towers Redevelopment Co. v. Yonkers*, 41 N.Y.2d 1, 359 N.E.2d 333, 390 N.Y.S.2d 822 (1976).[3]

The American Bar Foundation *Commentaries on Indentures* (1971) make clear that the purpose of successor corporation provisions is to insure that the "financial characteristics and repayment potential on which the lender relied" in investing in the debt obligations of a corporation are not altered in an adverse manner. *Commentaries* at 290-91; Tr. at 1096-97. Thus, "transfer of the assets of the obligor substantially as an entirety is . . . basic" to protecting the investment of debentureholders. *Commentaries* at p. 423; Tr. at 1098-1100.

Sharon's contention that UV's assets should be measured as of the date of sale, November 26, 1979, must be evaluated in light of the ramifications of the entire series of transactions and the underlying purpose of the successor corporation provisions as discussed above. When viewed in this manner, Sharon's suggested approach cannot be sustained. Carried to its logical conclusion, this approach would enable the final purchaser of the assets of a corporation engaged in a plan of liquidation to claim that it is the successor corporation because it purchased all the assets possessed by the selling corporation on the date of sale, regardless of how infintesimal those assets were as compared to the total assets of the corporation. Such a result clearly would leave the bondholders of a corporation

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3 All of the indentures in this case were to be construed under New York law except for the City of Port Huron and County of Itawamba indentures which were to be construed under the law of Michigan and Mississippi, respectively. Since neither Michigan nor Mississippi law has been brought to the attention of the court by the parties, it will be assumed that they are the same as New York law. The Court therefore will apply New York law as well as general principles of contract law in construing the Indentures in question.

without any protection, thereby defeating the purpose of the successor corporation provisions.

Furthermore, it is clear in this case that the sale of UV's assets to Sharon was part of its overall plan of liquidation. Indeed, there is no evidence that separate shareholder approval for this sale of assets to Sharon was sought or obtained by UV. *See* 13A Me. Rev. Stat. § 1003. Rather, the sale was carried out pursuant to the shareholders' approval of the Liquidation Plan on March 26, 1979. Tr. at 404-05, 768. Thus, UV's assets for the purpose of determining whether it sold "all or substantially all" of its property to Sharon must be measured from the date its Liquidation Plan received shareholder approval, March 26, 1979. *See* 13A Me.Rev. Stat. § 1106. *See generally Helvering v. Elkhorn Coal Co.*, 95 F.2d 732 (4th Cir.), *aff'd on rehearing*, 95 F.2d 737 (4th Cir. 1937), *cert. denied*, 305 U.S. 605, 59 S. Ct. 65, 83 L. Ed. 384 (1938).

There has been no testimony concerning the value of UV's assets on March 26, 1979. Rather, testimony concerning the sales price of UV's other assets sold pursuant to its Liquidation Plan has been introduced and the total amount realized from these sales has been contrasted with the amount realized from the sale to Sharon.

UV realized a total of $48,000,000 on its sale of Federal and its oil and gas properties and UV received an amount slightly in excess of $500,000,000 on its sale to Sharon. The amount realized on the sale to Sharon thus constituted approximately 50 or 51% of the total amount realized from all three sales. This is insufficient to render the sale to Sharon a sale of "all or substantially all" of UV's assets."

Thus, Sharon has failed to sustain its claims with respect to the Supplemental Indentures and I find as a matter of law, that it is not entitled to be recognized as successor obligor under the Indentures or Lease Guaranties.

The Antitrust Claims

Sharon's final claim is that the banks and the Intervenors have been engaged in unlawful agreements, combinations and conspiracies in restraint of interstate trade and commerce in the provision of credit, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. This claim is founded on the following premises: (1) that UV was paying a price of 5-3/8%, 8-7/8%, and 9-1/4% on the respective debentures and a price of 6-1/4% on the Lease Guaranties; (2) that these prices were considerably lower than the then prevailing market price for credit of this type; and (3) that the banks unlawfully agreed to take and have jointly taken steps to raise the price of money loaned to UV and make the terms and conditions of the loans more favorable to the trustees and the bondholders.

Sharon contends that the conduct of the banks in attempting to block the April 30, 1979 liquidating distribution, signing the April Document, refusing to execute Supplemental Indentures, declaring defaults under the Indentures and refusing to permit withdrawals from the $155,000,000 Fund, individually and in combination constitute unlawful restraints of trade.

Sharon's proof at trial showed that after UV announced its plans to liquidate, sell Reliance and make a liquidating distribution, Chase, U.S. Trust, and Manufacturers first individually inquired of UV how it planned to provide for its public debt. After receiving what they felt were only the most general and unsatisfactory responses, representatives of the banks met or conversed on several occasions to discuss their positions and how they could best protect the rights of the bondholders. As a result of these discussions, the banks decided to request a meeting with UV. This meeting was scheduled for the afternoon of April 26, 1979.

On the morning of April 26th, representatives of Chase, Manufacturers and U.S. Trust met to discuss their respective positions. Chase was then in the process of drafting a document which could be used as a basis for agreement with UV as to the manner in which it would provide for its public debt. If some agreement could not be reached, Chase planned to obtain

an injunction to block the distribution. U.S. Trust was undecided about whether it would go along with the proposed plan, and Manufacturers was reluctant to join in the plan. Tr. at 718. The latter, therefore, was preparing its own form of agreement to use as a basis for negotiating with UV. The general course of action planned by the Banks for the afternoon meeting with UV "was to explain to [UV] that one or more . . . trustees were prepared to enjoin the distribution or in the alternative, agreement in writing had to be worked out promptly as to how the various debt issues would be treated." Tr. at 720.

At the meeting with UV, a copy of Chase's plan for satisfying the debt was proffered to UV and Horace Robinson, counsel for Chase, set forth the common concerns of the three trustee banks with respect to fulfilling their fiduciary obligations to holders of UV's public debt. Robinson also stated that because of these concerns, the Trustees were prepared to go to Court to enjoin the planned liquidating distribution if agreement could not be reached on the question of providing for the indebtedness. UV responded with "vague assurances that there was sufficient money around to pay off the debt." During this stage of the meeting, Manufacturers proffered a separate proposal to UV.

UV representatives then left the meeting, caucused and returned with a proposal for the set aside of funds. The representatives of the Banks then caucused to determine how much money had to be set aside and to discuss the possibility of recommending to UV that it come up with a proposal for satisfying its debt. When the meeting reconvened, UV and the banks continued negotiating and agreed that $155,000,000 would be set aside. Upon UV's suggestion it was agreed that this fund was to be used to cover all its public indebtedness. The parties further agreed that UV would come forward with a proposal for satisfaction and discharge of the debt from the $155,000,000 Fund within ninety days. Tr. 746-47. The details of the agreement were worked out later that day and into early the next morning.

At the end of ninety-day period, on July 26, 1979, UV met separately with representatives of each of the three banks and

presented proposals for repaying the debt. Each of the banks told UV that it would consider the proposal presented to it.

Following the July 26, 1979 meeting, representatives of U.S. Trust, Chase and Manufacturers met to exchange ideas on how best to approach what they considered to be a "very difficult" situation, Tr. at 974, and to insure that the bondholders whom they represented were being treated equitably as compared to holders of bonds issued under the other indentures.

The plan proposed to U.S. Trust was for an advanced refunding or defeassance of the debt. In the opinion of counsel for U.S. Trust, UV's proposal plan was desirable in that it would improve the quality of the notes in the market in view of the high interest rates prevailing in the summer of 1979. By early August, 1979, both Chase and Manufacturers had rejected UV's proposal with respect to one of its indentures and Manufacturers was undecided about the response it would make.

From early August 1979 through the beginning of November 1979, there was intermittent contact among the trustees and between the trustees and UV concerning UV's proposals. In November 1979, it became evident that Sharon had decided to purchase UV's assets and assume UV's liabilities. Sharon requested that the Banks appear at the closing of the sale to UV for the purpose of executing Supplemental Indentures. However, none of the banks executed Supplemental Indentures on that date or on December 6, 1979 when Sharon again tendered them. On December 24, 1979, the banks issued default notices and subsequently commenced suit against Sharon.

Application of the Sherman Act

Section 1 of the Sherman Act provides that "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal." 15 U.S.C. § 1. In a civil suit for damages, a plaintiff must establish that two or more parties have entered into a

contract, combination or conspiracy that unreasonably restrains trade causing injury to his business or property. *See generally Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L. Ed. 2d 545 (1958).

Sharon contends that the above-described conduct of the banks violated section 1 of the Sherman Act in that it constituted an attempt to fix the price of UV's and Sharon's credit and amounted to a group boycott. In analyzing Sharon's claims, it is necessary to first determine whether Sharon has established a "mutual commitment to an anticompetitive course" among the banks.

It is well settled that "explicit agreement is not a necessary part of a Sherman Act conspiracy," especially where "joint and collaborative action [is] pervasive in the initiation, execution and fulfillment of [a] plan." *United States v. General Motors Corp.*, 384 U.S. 127, 142, 86 S. Ct. 1321, 1329, 16 L. Ed. 2d 415 (1966). While Sharon may have presented evidence that the Banks had engaged in collaborative action by exchanging information and ideas on the UV situation, there is no evidence that their commitment was to an anti-competitive course of conduct. Indeed, the evidence shows that the banks were not engaged in competition with respect to an obligor's obligations under outstanding indentures. Nevertheless, each of Sharon's claims will be examined to determine whether a *prima facie* case has been presented.

In order to establish a price-fixing violation, a plaintiff must show that the agreement of the defendants had the purpose or effect of fixing prices. *See Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). In this case, it simply cannot be said that the purpose of the banks conduct was to tamper with the price of credit offered to UV and Sharon. Rather, the clear and overriding purpose of the Banks' conduct was to secure the repayment of public debts which they believed were due and owing as a result of UV's liquidation and its having made a liquidating distribution.

An examination of the effect of the banks' conduct similarly fails to support a claim of price-fixing. The price paid by UV and Sharon for credit under the Indentures was fixed at the time the Indentures were issued. The banks merely were attempting to insure that the credit previously extended to UV would be repaid. Thus, this case does not involve an issue as to the extension of credit to UV and Sharon. Upon the evidence presented, it must be concluded as a matter of law that the banks were not engaged in pricefixing. *See generally Falstaff Brewing Co. v. New York Life Insurance Co.*, 513 F. Supp. 289, at 293 (N.D. Cal. 1978).

The next issue that must be addressed is whether the banks' conduct constituted an illegal group boycott under the Sherman Act. "Group boycotts or concerted refusals to deal with other traders, have long been held to" constitute per se violations of the act. They have not been saved by allegations that they were reasonable in the specific circumstances. . . ." *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212, 79 S. Ct. 705, 709, 3 L. Ed. 2d 741 (1959); *see St. Paul Fire and Marine Insurance Co. v. Barry*, 438 U.S. 531, 543, 98 S. Ct. 2923, 2930, 57 L. Ed. 2d 932 (1978); *United States v. General Motors Corp.*, 384 U.S. 127, 145-46, 86 S. Ct. 1321, 1330-31, 16 L. Ed. 2d 415 (1966).

I find that with respect to events occurring prior to December 24, 1979, the banks' conduct did not constitute a concerted refusal to trade or refusal to trade except on a limited basis. Indeed, the evidence at trial demonstrated that throughout the spring, summer and fall of 1979, each of the banks were desirous of negotiating with UV and maintain fairly independent positions with respect to the terms which would be acceptable to each. Thus, U.S. Trust, prior to the April 26, 1979 meeting had not decided upon the course of action it would follow and at the meeting, Manufacturers proffered a proposal different from that of Chase. When UV presented the trustees with proposals for repaying the debt in the summer of 1979, the banks again had different reactions to UV's plans and pursued negotiations of differing depth with respect to arriving at final agreement. In addition, some if not all of the

three banks attended the November 26, 1979 closing with the ability to execute Supplemental Indentures if satisfied with the documentation and other factors relating to Sharon's assumption of UV's obligations under the Indentures. Thus, the foregoing evidence plainly does not establish Sharon's claims with respect to a group boycott.

The banks' conduct with respect to the issuance of default notices on December 24, 1979 and the commencement of lawsuits at various times between December 1979 and July 1980 as a matter of law cannot be found to restrain trade because invocation of judicial processes for the resolution of business and economic interests does not violate the anti-trust laws unless the law-suits are baseless and instituted to harass. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 92 S. Ct. 609, 611-12, 30 L. Ed. 2d 642 (1972). As previously discussed, the lawsuits commenced by the banks were not of this character. Thus, Sharon has failed to establish its claim of group boycott.

Conclusion

For the foregoing reasons, I find that the evidence with respect to each of Sharon's eight causes of action is not "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 321 (1978). Sharon's claims against the Intervenors and Union Planters must also be dismissed, because based upon agency principles, they must fall with the claims against their alleged principals. Therefore, I grant the motions of Chase, Manufacturers, the Intervenors and Union Planters as a matter of law and dismiss the complaint in its entirety.

SO ORDERED.

Opinion of Werker, D.J.
dated May 29, 1981

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SHARON STEEL CORPORATION,

Plaintiff,

—v.—

The CHASE MANHATTAN BANK, N.A., Manufacturers Hanover Trust Company and United States Trust Company of New York,

Defendants.

MANUFACTURERS HANOVER TRUST COMPANY,

Third-Party Plaintiff,

—v.—

UV INDUSTRIES, INC.,

Third-Party Defendant.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, et al.,

Intervenors,

—v.—

SHARON STEEL CORPORATION,

Plaintiff,

—and—

UV Industries, Inc.,

Third-Party Defendant.

UNION PLANTERS NATIONAL BANK OF MEMPHIS, as Trustee,
Plaintiff,

—v.—

UV INDUSTRIES, INC. and David Finkelstein, Arthur R. Gralla, Martin Horwitz, Edwin Jacobson, Theodore W. Kheel, and Paul Kolton, as Trustees of the UV Industries, Inc. Liquidating Trust,
Defendants,

—and—

Sharon Steel Corporation,
Defendant.

Nos. 79 Civ. 6996 (HFW), 80 Civ. 5341 (HFW).

United States District Court,
S. D. New York

May 29, 1981.

OPINION

WERKER, District Judge.

Plaintiff, Sharon Steel Corporation ("Sharon"), commenced this action against defendants, The Chase Manhattan Bank, N.A. ("Chase"), Manufacturers Hanover Trust Company ("Manufacturers"), and United States Trust Company of New York ("U.S. Trust").[1] Manufacturers impleaded UV Industries,

1. All claims and counterclaims pending between and among Sharon, UV and U.S. Trust were dismissed with prejudice pursuant to stipulation of the parties on May 11, 1981. Because the caption of the action has not yet been amended to reflect this, U.S. Trust must continue as a named defendant. Despite the settlement, reference to U.S. Trust in the course of this opinion was necessary for full development of the facts.

Inc. (UV) as a third-party defendant, and the holders of certain UV debentures (the "Intervenors") intervened, asserting claims against both Sharon and UV. Union Planters National Bank of Memphis ("Union Planters") subsequently commenced a separate action against UV, the Trustees of the UV Industries Inc. Liquidating Trust, (the UV Trustees) and Sharon Steel Corporation. The Union Planters suit has been consolidated with the main action for all purposes.

This action was tried before a jury but, at the conclusion of plaintiff's case, the Court, in an opinion dated May 11, 1981, directed a verdict dismissing each of Sharon's causes of action against Chase, Manufacturers, the Intervenors and Union Planters. On May 12, 1981, the banks and the Intervenors moved for summary judgment on their claims against Sharon, UV, and the UV Trustees. The findings made in the May 11, 1981 opinion will not be repeated here. Suffice it to say that they are incorporated herein by reference and knowledge of them is assumed.

Manufacturers has asserted four claims against UV. Its first claim is that UV has breached the April Agreement by failing to pay the 8-7/8% debentures, failing to satisfy and discharge the Indenture, and failing to come forward with a proposal for satisfaction and discharge of the debt that complied with the terms of the Indenture. Its second claim is that UV is in default under the Indenture. Manufacturers' third claim is that UV has violated Maine law. Its fourth claim is for reimbursement and indemnification of expenses incurred by it in connection with its administration of the trust, including costs and expenses incurred in this litigation, pursuant to § 7.06 of the Manufacturers Indenture. Each of the above claims also has been asserted against Sharon, apparently on the basis that Sharon assumed UV's liabilities relating to or arising from the Indenture, the 8-7/3% debentures and the April Agreement. In addition, Manufacturers has asserted one claim against Sharon alone. It claims that Sharon holds assets received from UV in trust for Manufacturers as indenture trustee for the 8-7/8% debentures.

Chase has asserted claims against UV, the UV trustees and Sharon. Its first claim is that UV has breached the April Agreement by failing to redeem the 5-3/8% debentures and the City of Port Huron bonds, failing to satisfy the 1965 and 1968 Indentures, and failing to come forward with a proposal to do so. Its second claim is that UV is in default under the 1965 Indenture and the Port Huron Lease Guaranty. Chase's third claim is that UV has violated Maine law. Chase has asserted each of the above claims against the UV Trustees and Sharon on the ground that they have assumed UV's liabilities and obligations with respect to the Indentures and April Agreement. In addition, Chase claims that the UV Trustees and Sharon hold assets received from UV in trust for Chase as indenture trustee for the 5-3/8% debentures and Port Huron Bonds. Finally, Chase requests reimbursement of its costs and expenses including reasonable attorneys' fees incurred in this litigation.

Union Planters has asserted claims against UV, the UV Trustees and Sharon. Its first claim is that UV, the UV trustees and Sharon have breached the April Agreement by failing to pay or agreeing to redeem the County of Itawamba bonds, failing to satisfy and discharge the County of Itawamba Indenture, and failing to come forward with a proposal to do so. Union Planters' second claim is that UV and the UV Trustees are in default under the County of Itawamba Indenture and the Lease Guaranty. Its third claim is that UV and the UV Trustees have violated Maine law. Its fourth claim is that Sharon holds assets received from UV that should have been tendered to Union Planters as Indenture trustee for the County of Itawamba bonds. Its final claim is that UV, the UV Trustees and Sharon must pay or reimburse Union Planters for its services and expenses including counsel fees pursuant to § 1102 of the County of Itawamba Indenture.

The Intervenors have asserted claims against UV and Sharon. Their first claim is that UV is in default under the Manufacturers Indenture and the 8-7/8% debentures. Their

second claim is that UV and Sharon have violated Maine law. Their third claim is that UV's purported assignment and Sharon's purported assumption of UV's liabilities and obligations under the Indenture and debentures are invalid. The Intervenors fourth claim is that Sharon holds all assets received from UV in trust for the Intervenors and other members of the class of 8-7/8% debentureholders. The Intervenors also seek recovery of their costs and expenses, including attorneys fees incurred in this litigation although the basis for this claim and the party or parties against whom it is asserted have not been specified.

The foregoing claims present six issues. The first is whether there has been a breach of the April Agreement; second, whether there has been a default under the respective Indentures; third, whether a violation of Maine law has occurred; fourth, whether the trustee banks and the Intervenors are entitled to attorneys' fees; fifth, whether the UV Trustees or Sharon must be deemed to hold assets received from UV in trust for the trustee banks and their debentureholders and bondholders; sixth, whether UV's purported assignment and Sharon's purported assumption of UV's liabilities and obligations under the Indentures and debentures is invalid.

Summary Judgment

On a motion for summary judgment, a Court's function is not to adjudicate issues of fact, but to " 'determine whether there are issues to be tried.' " *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978), (quoting *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967), *cert. denied*, 404 U.S. 1063, 92 S.Ct. 737, 30 L.Ed.2d 725 (1972). In determining whether genuine issues of material fact exist, the Court must "resolve all ambiguities and draw all reasonable inferences in favor of the party against whom

summary judgment is sought." *Flli Moretti Cereali v. Continental Grain Co.*, 563 F.2d 563, 565 (2d Cir. 1977). The burden is on the moving party to show the absence of dispute as to any material fact. *Id.* at 565. Viewing the facts in the light most favorable to Sharon and UV, it nevertheless appears that no genuine issue exists as to the material facts, and disposition of this action by summary judgment is warranted.

Default Under the Indentures

On December 24, 1979, Chase gave notice to UV that an event of default had occurred under the 5-3/8% Indenture and the City of Port Huron Indentures. The event of default identified by Chase in each of the notices was UV's failure to observe the successor corporation provisions of the Indentures and Lease Guaranty in connection with UV's sale of assets to Sharon on November 26, 1979. The notices further stated that if the condition continued for thirty days after receipt of the notices of default, an Event of Default would occur under each Indenture.

Manufacturers, by letter dated December 24, 1979 also gave notice to UV that it considered UV's sale of assets to Sharon violative of the successor corporation provisions of the Manufacturers Indenture. The notice further stated that if the condition giving rise to the default continued for 90 days from the date of the letter, it would become an Event of Default under the Indenture.

By letter dated July 24, 1980, Union Planters gave notice to UV that a default had occurred under the Indenture by reason of UV's failure to comply with the provisions of the County of Itawamba Lease Guaranty in connection with its disposition of assets to Sharon on November 26, 1979. The notice further stated that if the condition continued for 30 days after receipt of the notice, it would become an Event of Default under the Indenture.

In an opinion dated May 11, 1981, this Court found that Sharon did not purchase "all or substantially all" of the assets of UV and therefore did not qualify as a successor corporation within the meaning of the Indentures. Based upon this finding and an examination of the Indentures in question, I now conclude that UV was in default under each of the Indentures and Lease Guaranties when it failed to cure the defaults after notice of default was given by the trustees. Thus, UV was in default under the 5-3/8%, the City of Port Huron and the County of Itawamba Indentures thirty days after it received notice of default from the trustees and UV was in default under the 8-7/8% debentures 90 days after notice of default was given by Manufacturers. In addition, since Sharon did not qualify as a successor obligor, UV's purported assignment of its liabilities and obligations under the Indentures and debentures, and Sharon's purported assumption of those liabilities and obligations were invalid.

April Agreement Claim

The trustees claim that the April Agreement has been breached as a result of UV's failure to pay the debentures and bonds, its failure to satisfy and discharge the Indentures under which they were issued, and its failure to come forward with a proposal for satisfaction and discharge of the debt.

UV contends that its only obligation under the provision of the April Agreement requiring it to present a proposal for satisfaction and discharge of the Indentures, was to present in good faith a proposal for the payment of its debt. It claims that it fulfilled this obligation when it presented plans for the net defeasance of the indebtedness to the trustees on July 26, 1979. According to UV, it was under no obligation to proffer a proposal that complied with the redemption provisions of the Indentures and the April Agreement nowhere stated that the proposal had to comply with the Indentures.

The Intervenors and trustees argue that under the terms of the April Agreement, UV's proposals had to be proposals to pay the indebtedness and satisfy and discharge the Indentures. The only way of doing this, according to the Intervenors and trustees, was in the manner specified in the Indentures.

The April Agreement provides:

> (1) . . . [UV] shall present to each of the Corporate Trustees within 90 days after the date hereof [April 26, 1979] a proposal for the payment of its respective issue of Public Indebtedness and for satisfaction and discharge of [its] obligations under its respective Public Indebtedness Indenture unless previously satisfied and discharged.

Although UV contends that compliance with the terms of the Indentures was neither required nor necessarily expected of it, I find that such compliance was in fact expected by the parties and required under the contract. First, the language of the Agreement required a proposal for satisfaction and discharge of UV's obligations under the Indentures. Since the Indentures specify the manner in which they may be satisfied and discharged, it follows that any proposals for satisfaction and discharge would have to conform with the terms of the Indentures. Second, the deposition testimony of Timothy C. Crane, a Vice-President in the Corporate Trust Department at Manufacturers, demonstrates that the trustees' position was "that the debentures should be treated in a manner which was consistent with the terms of the indenture. . . ." Affid. of Bruce Hecker, sworn to May 15, 1981, Ex. 6.

The next issue is whether the proposals presented by UV on July 26, 1979 complied with the terms of the Indentures. The proposals presented by UV on July 26, 1979 provided for a net defeasance or advanced refunding of the indebtedness. The evidence at trial demonstrated that Chase and Manufacturers both rejected the proposals presented by UV on July 26, 1981 because, in their opinion, the proposals did not comply with the terms of the 5-3/8% and 8-7/8% debentures. Tr. at 521-24, 997. Although Chase and Union Planters expressed interest in UV's proposal for advanced refunding of the City of Port

Huron and the County of Itawamba Indentures, respectively, neither proposal ever was implemented by UV.

The provisions of the Indentures concerning satisfaction and discharge of the Indentures make clear that in order to satisfy and discharge its obligations under the 5-3/8% and 8-7/8% indentures, UV was required to immediately pay the principal, interest and premium, if any, due on the debentures. Under the City of Port Huron and the County of Itawamba Indentures, UV was required to immediately pay the principal, interest and premium, if any, on the bonds or to undertake an advance refunding of the bonds. *See* Chase 5-3/8% Indenture, Article XV; Manufacturers Indenture, Article XII; City of Port Huron Indenture, Article IX; County of Itawamba Indenture, Article IX. As noted above, the proposals presented by UV on July 26, 1979, did not provide for immediate payment. Consequently, I find that UV was in breach of the April Agreement on July 26, 1979 when it failed to present a proposal for the immediate payment of the 5-3/8% and 8-7/8% debentures.

The second aspect of the breach asserted by the Intervenors and trustees is the transfer of the Fund to Sharon on November 26, 1979. The trustees and the Intervenors contend that this action by UV violated the April Agreement because UV had no right to transfer the Fund and because "in transferring the fund, UV took no steps to assure that the fund would not be used for any purpose other than for payment, satisfaction and discharge of the indebtedness." UV, on the other hand, contends that the language of the April Agreement "seems to contemplate" a transfer such as the one made to Sharon.

The April Agreement provides:

> (c) [UV] shall only use or permit the use of the cash or permitted investments in the Accounts for payment of any Public Indebtedness or satisfaction and discharge of any of the above-described Indentures; . . .

I find that the language of the foregoing provision did not preclude a transfer of the Fund so long as such transfer was on the condition that the Fund would only be used for the payment of UV's public debt and for satisfaction and dis-

charge of the Indentures. This proviso was not set forth in either the Purchase Agreement or Assumption Instrument and Sharon subsequently repudiated the agreement and sought to divert the use of the Fund to its own benefit. This conduct constituted a breach of the agreement by UV and Sharon. In addition, UV informed the trustees that it had no further obligations under the Indentures once Sharon had assumed its debt. Tr. at 523-24. While it may have been permissible for UV to have assigned its rights and delegated its obligations under the April Agreement to Sharon, such delegation was ineffective to release UV from liability to its creditors with respect to these obligations because the creditors' consent to the delegation was never obtained. *See Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918 (2d Cir. 1977). Consequently, the entire series of events concerning UV's sale of assets to Sharon without specifically providing for Sharon's assumption of UV's liabilities under the April Agreement, UV's repudiation of further responsibility under the Agreement and Sharon's repudiation of UV's obligations under the Agreement, constituted a breach of the April Agreement. Thus, the April Agreement was breached for the first time with respect to the City of Port Huron and County of Itawamba Indentures on November 26, 1979.

The Maine Law Claims

The trustees and the Intervenors contend that UV violated the law of the state of Maine when it made a liquidating distribution of $18 per share on April 30, 1979 because UV did not redeem the bonds prior to that time. According to the Intervenors and trustees, the "provide for" language in the Maine statute "is not intended to alter contractual agreements among parties that specifically set forth the manner of payment, satisfaction and" discharge of the obligations of one of the parties. UV and Sharon contend that the April 30th distribution did not violate Maine law (1) because it retained cash and securities in an amount far in excess of its indebted-

ness, even after it made the distribution and therefore, the rights of its creditors were not impaired and (2) because the $155 fund established pursuant to the April Agreement constituted adequate provision for payment of its debts.

Under Maine law:

> After paying or adequately providing for the payment of all its obligations, the corporation shall distribute the remainder of its assets, either in cash or in kind, among its shareholders according to their respective rights and interests.

13A Me. Rev. Stat. § 1106.4.

There is little decisional law interpreting the language "after paying or adequately providing for the payment of all its obligations" utilized in § 1106.4. UV suggests that this phrase permits a dissolving corporation to either pay or provide for the payment of its obligations in any commercially reasonable manner that does not substantially increase the risk to creditors. According to the affidavit of David J. Halperin, both the set aside of funds in an amount sufficient to satisfy obligations and the express assumption of the obligations by a solvent public corporation would satisfy this requirement. Affid. of David J. Halperin, sworn to March 12, 1981 at ¶¶ 5-7.

The banks and the Intervenors contest this interpretation. They contend that the Maine provision must be interpreted to require payment to creditors before any distribution to shareholders. According to the trustees and the Intervenors, the "adequate provision for" language of the statute is designed to deal only with contingent liabilities, not those that are certain.

It is hornbook law that corporate "property must first be appropriated to payment of corporate debts and liabilities before any distribution among stockholders. Thus, . . . the modern corporation statutes generally require that the debts and liabilities of the corporation to its creditors must be paid or adequately provided for in the dissolution proceedings before the distribution of corporate assets to stockholders." Richard P. Eickhoff, 16A *Fletcher Cyclopedia of the Law of Private Corporations* § 8219 (perm. ed. 1979); *see In re*

Baldwin Trading Corp., 8 N.Y.2d 144, 168 N.E. 383, 202 N.Y.S.2d 312 (1960); *Bartlett v. Drew*, 57 N.Y. 587 (1874).

The issue in this case presents the limited question of whether a corporation may set aside funds to provide for payment of its outstanding debts and make a partial liquidating distribution to shareholders prior to the completion of its dissolution. This question is not resolved by reference to settled law and must be examined in light of the purpose of the statutory provision.

The purpose of provisions requiring payment to creditors before distribution of corporate assets to shareholders is to preserve "the existing rights of priority of all creditors" of a corporation that is winding up its affairs. *Cobb v. Camden Savings Bank*, 106 Me. 178, 76 A. 667, 669 (Sup. Ct. 1909). In this case, the fund created pursuant to the April Agreement accomplished this purpose. The fund was to be used only for the payment of UV's public indebtedness and satisfaction and discharge of the Indentures. The fact that the "provision for" language utilized in the statute was designed primarily to establish a method by which corporations could arrange for the payment of contingent liabilities, *see Bujega v. Davis*, 34 Misc.2d 276, 228 N.Y.S.2d 216 (Sup. Ct. Kings County 1962), does not require a different result. Therefore, I hold that the fund sufficed to preserve the priority of UV's creditors to payment of its outstanding obligations and that Maine law was not violated when UV made the partial liquidating distribution to its shareholders on April 30, 1979.

Constructive Trust and Restitution

The next issue that must be addressed is whether Sharon must be deemed to be holding the $155 million Fund received from UV in trust for the trustee banks and their debentureholders and bondholders. "[A] constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." A. Scott, 5

The Law of Trusts § 462 at 3413 (3d ed. 1967); *United States v. Augspurger*, 452 F. Supp. 659 (W.D.N.Y. 1978), *motion for reconsideration denied*, 477 F. Supp. 94 (W.D.N.Y. 1979). Such a trust arises whether or not the acquisition of title to the property was wrongful, *id.* at § 462.2, and whether or not a fiduciary relationship existed between the parties. *See Cherno v. Dutch American Mercantile Corp.*, 353 F.2d 147 (2d Cir. 1965).

The Intervenors and trustees contend that Sharon acquired assets from UV that Sharon knew should have been tendered to the Indenture Trustees for satisfaction and discharge of UV's obligations under the Indentures. It is clear in this case that Sharon knew or, at the very least, had notice of the claims of the trustees to the fund that it purchased. Consequently, it would be inequitable for Sharon to retain title to the Fund now that it has been determined that it is owing to the Indenture Trustees on behalf of their debentureholders and bondholders. Thus, a constructive trust will be impressed to preserve the rights of those entitled to the Fund. *See Coane v. American Distilling Co.*, 298 N.Y. 205, 81 N.E.2d 90 (1948).

In addition to the imposition of a constructive trust, the Intervenors and trustees seek restitution of the approximately $50,000 per day interest earned on the $155 million Fund from the date that the indebtedness was required to be redeemed. Sharon contends that the trustees and Intervenors are not entitled to this interest. According to Sharon, "each of the debentures . . . specifically provides that interest shall be paid at the rate borne by the debentures until the principal has been paid" and the trustees and Intervenors are not entitled to interest in excess of that provided for in the Indentures.

Sharon's contention must be rejected. At issue here is not the rate of interest to be paid on the debentures. Rather, it is the windfall interest which was earned on a separate fund, the proceeds of which were to be used to satisfy the claims of UV's public bondholders. In my opinion, when the provisions of the April Agreement establishing this Fund were breached by UV and Sharon, they no longer were entitled to receive the interest accruing on the deposited funds. In addition, had the deben-

tures been discharged in the manner required by the April Agreement, this money would have been realized by the debentureholders and bondholders. Thus, the elements necessary to establish a claim for unjust enrichment are present in this case. Sharon and UV were enriched at the expense of the Intervenors and the Trustees and the circumstances are such that in equity and good conscience Sharon and UV should make restitution of the amounts received. *Chase Manhattan Bank (National Association) v. Banque Intra, S.A.*, 274 F. Supp. 496 (S.D.N.Y. 1967).

Attorneys' Fees

The trustees and the Intervenors have requested that UV and Sharon be directed to pay or reimburse them for their costs and expenses including attorneys' fees. The trustees have asserted their claims on the basis of clauses in the Indentures which specifically provide for reimbursement of the trustee for all reasonable expenses, advances and disbursements of the Trustee including the reasonable compensation and expenses and disbursements of its counsel. Chase 5-3/8% Indenture, § 10.06; Manufacturers Indenture, § 7.06; City of Port Huron Indenture, § 1102; County of Itawamba Indenture, § 1102. Sharon has not objected to these claims. Sharon, however, has objected to the payment of the Intervenors costs and expenses including attorneys' fees, incurred in connection with this litigation.

Sharon contends that an award of attorneys' fees to the Intervenors would contravene the general rule that a prevailing litigant is not entitled to collect a reasonable attorneys' fee in the absence of a specific statutory provision entitling them to such fee. The Intervenors contend that they are entitled to these fees because they "took a substantial role in this litigation [and] [i]n doing so, they incurred many expenses which . . . would have been the responsibility of Manufacturers."

The Intervenors reasoning is unpersuasive with respect to the claims asserted under the Indentures. Manufacturers was ac-

tively involved in representing the rights of the holders of the 8-7/8% debentures in this litigation. It was the Intervenors voluntary decision to intervene in this litigation. There is no reason to now require Sharon to pay the fees of Manufacturers as well as those of the debentureholders who decided to intervene. In addition, such an award has no foundation in the Manufacturers Indenture.

With respect to the claims made under the April Agreement and the award of restitution, however, I find that counsel for the Intervenors may be entitled to an award of attorneys' fees. This would depend upon the benefit conferred upon the class by the actions of its attorneys. In order to ascertain what that benefit may be, the proportionate benefit received by the holders of the 8-7/8% debentures must be assessed. *See Detroit v. Grinnell Corp.*, 495 F.2d 448, 468-470 (2d Cir. 1974).

Redemption Premium

The Intervenors and trustees assert that the satisfaction and discharge provisions of the Indentures require that the debentures and bonds be redeemed for principal, interest and premium. Sharon contends that a redemption premium is not due because by declaring defaults, the trustees have accelerated the maturity of UV's public debt and the redemption is involuntary. Thus, according to Sharon, only principal and interest are due under the Indentures.

Each of the Indentures contain a provision under which UV at any time could elect to redeem the debentures for principal, interest and premium, if any. The trustees and Intervenors argue that UV's decision to embark upon a liquidation plan and sell its assets provides the requisite voluntariness.

After an examination of the redemption and default provisions of the Indentures, I find that the default provisions are controlling in this situation and that they do not provide for redemption premium. The redemption provisions of the Indentures state rather generally that the debentures may be redeemed at the option of the company at any time after a

certain date and set forth the procedures to be followed for redemption. In contrast to this provision setting forth in general terms the right of the obligor to redeem the debentures, the default provisions specifically provide for what constitutes an event of default and the remedies available to the trustees and bondholders upon such default. Thus, each Indenture provides that the failure to observe any of the conditions of the Indenture constitutes an event of default and sets forth the action that may be taken by the trustees and debentureholders upon the default. In this case, the trustees declared defaults under each of the Indentures because of UV's failure to comply with the successor corporation provisions of the Indentures in connection with its sale of assets to Sharon. When UV failed to cure the default within the time period specified in each Indenture, the remedy provided to the trustees and debentureholders under the default provisions was a declaration that the principal of all the debentures then outstanding and the interest accrued thereon was immediately due and payable without premium.

Because the default provisions provide with specificity the circumstances constituting defaults under the indentures and also provide the rights of the trustees and bondholders upon such default, I find that they must control in this situation. A significant factor contributing to my decision is the fact that the default provisions state that any failure to comply with the provisions of the Indenture constitutes an event of default. It is clear from this language that the failure to comply may be involuntary or the result of a voluntary act of the debtor corporation. Since the remedies for such a voluntary default are specifically elaborated, it would do violence to the principle that specific provisions of a contract should prevail over general ones to hold that the redemption provisions rather than the default provisions apply in this situation. In addition, a contract should be considered as a whole with every provision to be given effect if a reasonable meaning, not inconsistent with the other provisions can be accorded to it. *See* J. Calamari & J. Perillo, *The Law of Contracts* ¶ 3-11. Thus, the

trustees and the Intervenors argument that redemption premiums are due must be rejected.

Conclusion

Based upon the foregoing, I conclude that there has been a default under the Indentures and Lease Guaranties entitling the trustees and their bondholders and debentureholders to immediate payment of the debentures with accrued interest only. Pre-judgment interest at the rate of 6% per annum is to run from January 24, 1980 with respect to the 5-3/8% Indenture and the City of Port Huron Indenture, from March 24, 1980 with respect to the Manufacturers Indenture, and from August 24, 1980 with respect to the County of Itawamba Indenture.

In addition, I conclude that the April Agreement was breached by UV, that Sharon now holds the $155 million Fund as constructive trustee for the Indenture trustees and the bondholders and debentureholders, and that the trustees and the bondholders and debentureholders are entitled to recover the interest earned on the Fund by UV and Sharon from the date on which the April Agreement was breached with respect to the various Indentures. In addition, pre-judgment interest is to run at the rate of 6% per annum on the interest earned by UV and Sharon from July 26, 1979 with respect to the Chase 5-3/8% Indenture and the Manufacturers Indenture and from November 26, 1979 with respect to the County of Itawamba and the City of Port Huron Indentures. *See Newburger, Loeb & Co. v. Gross*, 611 F.2d 423, 433-34 (2d Cir. 1979).

I further conclude that the trustees are entitled to recover the reasonable costs and expenses of this action including a reasonable attorneys' fee and that the Intervenors are entitled to attorneys' fees with respect to the restitution of the interest earned by Sharon and UV on the $155 million Fund to the extent that they demonstrate that they are so entitled.

In addition, UV is enjoined from making further liquidating distributions to its shareholders during the pendency of any appeals which may follow in this action. Finally, during any

appeals which may ensue in this action, the $155 million Fund is to be held to the credit of this action and the trustees and Intervenors in the accounts and in the securities in which it is now held. The amount of restitution and interest is to be computed and deposited in Court to the credit of this action with instructions to invest in certificates of deposit or treasury bills. When such deposits are made, the need for a supersedeas bond will be obviated and consequently, will not be required.

Submit judgment on notice.

SO ORDERED.

Judgment of the District Court dated August 17, 1981

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Civ. 6996
(HFW)
(Action No. 1)

SHARON STEEL CORPORATION,

Plaintiff,

—against—

THE CHASE MANHATTAN BANK, N.A., MANUFACTURERS HANOVER TRUST COMPANY and UNITED STATES TRUST COMPANY OF NEW YORK,

Defendants.

MANUFACTURERS HANOVER TRUST COMPANY,

Third-Party Plaintiff,

—against—

UV INDUSTRIES, INC.,

Third-Party Defendant.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, CONNECTICUT GENERAL LIFE INSURANCE COMPANY, THE PENN MUTUAL LIFE INSURANCE COMPANY, UNION DIME SAVINGS BANK, IDS LIFE INSURANCE COMPANY, IDS LIFE INSURANCE COMPANY OF NEW YORK, ANCHOR NATIONAL LIFE INSURANCE COMPANY, BANKERS LIFE IN-

SURANCE COMPANY OF NEBRASKA, PHOENIX MUTUAL LIFE INSURANCE COMPANY, UNITED BENEFIT LIFE INSURANCE COMPANY LIFE INSURANCE COMPANY OF NORTH AMERICA, AMERICAN NATIONAL INSURANCE CO., STANDARD LIFE AND ACCIDENT INSURANCE COMPANY, GENERAL AMERICAN LIFE INSURANCE COMPANY, MONUMENTAL LIFE INSURANCE COMPANY, MONARCH LIFE INSURANCE COMPANY, COUNTRY LIFE INSURANCE COMPANY, WESTERN LIFE INSURANCE COMPANY, and VOLUNTEER STATE LIFE INSURANCE COMPANY, on behalf of themselves and as representatives of a class,

Intervenors,

—against—

SHARON STEEL CORPORATION,

Plaintiff,

—and—

UV INDUSTRIES, INC.,

Third-Party Defendant.

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80 Civ. 5341
(HFW)
(Action No. 2)

UNION PLANTERS NATIONAL BANK OF MEMPHIS, as Trustee,

Plaintiff,

—against—

UV INDUSTRIES, INC. and DAVID FINKELSTEIN, ARTHUR R. GRALLA, MARTIN HORWITZ, EDWIN JACOBSON, THEODORE W. KHEEL, and PAUL KOLTON, as Trustees of the UV Industries, Inc. Liquidating Trust,

Defendants,

—and—

SHARON STEEL CORPORATION,

Defendant.

JUDGMENT

Actions No. 1 and No. 2 having been consolidated by direction of the Court on April 13, 1981; and

Action No. 1 having been certified by opinion and order dated September 3, 1980 and order dated September 25, 1980 as a class action pursuant to Fed.R.C.P. 23(b)(2) with respect to the claims of Intervenors Connecticut Mutual Life Insurance Company, The Mutual Life Insurance Company of New York, Connecticut General Life Insurance Company, The Penn Mutual Life Insurance Company, Union Dime Savings Bank, IDS Life Insurance Company, IDS Life Insurance Company of New York, Anchor National Life Insurance Company, Bankers Life Insurance Company of Nebraska, Phoenix Mutual Life Insurance Company, United Benefit Life Insurance Company, Life Insurance Company of North America, American National Insurance Co., Standard Life and Accident Insurance Company, General American Life Insurance Company, Monumental Life Insurance Company, Volunteer State Life Insurance Company, Monarch Life Insurance Company, Country Life Insurance Company, and Western Life Insurance Company asserted in their Intervenors Complaint, and the class (the "Class") being composed of all holders of 8-7/8% Debentures (the "8-7/8% Debentures") of UV Industries, Inc. ("UV") issued pursuant to the Indenture dated as of April 15, 1977; and

Plaintiff Sharon Steel Corporation ("Sharon") having withdrawn with prejudice its second claim for relief; and Sharon having withdrawn with prejudice each and every claim for relief against United States Trust Company of New York ("U.S. Trust") and U.S. Trust having withdrawn with prejudice its counterclaims against Sharon and UV in connection

with a settlement agreement between Sharon and U.S. Trust dated January 15, 1981; and

Actions No. 1 and No. 2 (except for the aforesaid claims which were withdrawn with prejudice) having been duly tried on April 13, 14, 21, 22, 23, 24, 28, 29 and 30, 1981 and May 4, 5 and 6, 1981; and the Court, on motions of defendants The Chase Manhattan Bank, N.A. ("Chase"), Manufacturers Hanover Trust Company ("Manufacturers") and Union Planters National Bank of Memphis ("Union Planters") (sometimes referred to collectively herein as the "Indenture Trustees") and of Intervenors on behalf of themselves and the Class, made at the close of Sharon's case, and by opinion and order dated May 11, 1981 and opinion and order dated May 29, 1981 (i) having held that the Indenture Trustees and Intervenors are not liable to Sharon on any of Sharon's claims or counterclaims for relief; (ii) having directed a verdict and judgment in favor of the Indenture Trustees, and Intervenors and the Class, and against Sharon on the amended complaint and each and every claim for relief asserted therein dismissing said amended complaint and each and every such claim for relief asserted therein; (iii) having directed a verdict and judgment in favor of Union Planters, and Intervenors and the Class, and against Sharon on Sharon's counterclaims and dismissing said counterclaims and each and every claim for relief asserted therein by Sharon; and (iv) having directed summary judgment in favor of the Indenture Trustees and the Intervenors and the Class and against UV, the Trustees of the UV Trust and Sharon on the claims of the Indenture Trustees and Intervenors on behalf of themselves and the Class; and

For the reasons set forth in this Court's aforesaid opinions and orders dated May 11, 1981 and May 29, 1981, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Sharon's amended complaint and each and every claim for relief alleged therein, be and they hereby are dismissed with prejudice, and each of Chase and Manufacturers have judgment against Sharon on each claim for relief and on the amended complaint.

2. Sharon's counterclaims asserted against Intervenors be and they hereby are dismissed with prejudice, and Intervenors have judgment against Sharon on said counterclaims.

3. Sharon's counterclaims asserted against Union Planters be and they hereby are dismissed with prejudice, and Union Planters have judgment against Sharon on said counterclaims.

4. The Indenture Trustees, and the Intervenors on behalf of themselves and the Class, have judgment against UV, the Trustees of the UV Trust, and Sharon jointly and severally, that all liabilities and obligations, which are hereby declared due and payable, be paid, satisfied and discharged under and in accordance with the terms of the debt instruments described below as follows:

(a) In favor of Intervenors on behalf of themselves and the Class, and in favor of Manufacturers as Trustee under the Indenture dated as of April 15, 1977 for the 8-7/8% Debentures, in the amounts of:

(i) $66,775,000, representing the outstanding principal amount of the 8-7/8% Debentures; and

(ii) $1,737,293, representing accrued interest on the 8-7/8% Debentures from and including April 15, 1981 (the date of the last payment of the semi-annual installment of interest thereon) to and including July 30, 1981.

(b) In favor of Chase, as Trustee under the Indenture dated as of September 1, 1965 for the 5-3/8% Subordinated Debentures (the "5-3/8% Debentures") of United States Smelting, Refining and Mining Company (subsequently UV), in the amounts of:

(i) $14,218,900, representing the outstanding principal amount of the 5-3/8% Debentures; and

(ii) $161,229, representing accrued interest on the 5-3/8% Debentures from and including May 15, 1981 (the date of the last payment of the semi-annual installment of interest thereon) to and including July 30, 1981.

(c) In favor of Chase, as Trustee under the Indenture dated as of December 1, 1968 for the 6-1/4% Industrial Revenue Bonds (the "Port Huron Bonds") issued by the City of Port Huron, Michigan, in the amounts of:

(i) $16,550,000, representing the outstanding principal amount of the Port Huron Bonds; and

(ii) $170,034, representing accrued interest on the Port Huron Bonds from and including June 1, 1981 (the date of the last payment of the semi-annual installment of interest thereon) to and including July 30, 1981.

(d) In favor of Union Planters, as Trustee under the Indenture dated as of November 12, 1968 for the 6-1/4% Industrial Revenue Bonds (the "Itawamba Bonds") issued by the County of Itawamba, Mississippi, in the amounts of:

(i) $9,780,000, representing the outstanding principal amount of the Itawamba Bonds; and

(ii) $100,479, representing accrued interest on the Itawamba Bonds from and including June 1, 1981 (the date of the last payment of the semi-annual installment of interest thereon) to and including July 30, 1981.

(e) In favor of the Indenture Trustees, and Intervenors on behalf of themselves and the Class, requiring that upon the deposit with the Indenture Trustees pursuant to Paragraph 10 hereof, UV, the Trustees of the UV Trust, and Sharon take the actions prescribed in the aforesaid Indentures to be taken by the obligors thereunder as a condition for the cancellation, satisfaction and discharge thereof; and that, upon the taking of such actions and upon the deposit pursuant to Paragraph 10 hereof, each of the Indenture Trustees shall do all things required of it under the respective Indentures to evidence the cancellation, satisfaction and discharge of the respective Indentures and compliance with the applicable provisions

thereof; and with respect to the Port Huron and Itawamba Bond issuances, Sharon shall thereupon have the right under the respective leases to terminate such leases, upon which such leases and all the respective terms thereunder shall expire, and to purchase, as therein provided, the respective leased premises therein described, and each of the respective Indenture Trustees shall do all things required of it under the respective lease guaranties to evidence the release and discharge from the obligations and liabilities thereunder.

5. The Indenture Trustees, and the Intervenors on behalf of themselves and the Class, have judgment against UV, the Trustees of the UV Trust, and Sharon jointly and severally, that UV, the Trustees of the UV Trust, and Sharon make restitution to the Indenture Trustees, Intervenors, and the Class of the amounts earned on the fund which was deposited pursuant to the agreement dated April 27, 1979 among UV, Chase, Manufacturers and U.S. Trust entitled "Agreement for Treatment of Certain Obligations of UV Industries, Inc." (the "April Agreement") and earned on the Constructive Trust established pursuant to Paragraph 10 hereof (said fund and Constructive Trust being referred to together herein as the "Fund"), as follows:

(a) In favor of Intervenors on behalf of themselves and the Class, and in favor of Manufacturers as Trustee with respect to the 8-7/8% Debentures, in the amounts of:

(i) $6,665,616 (representing the amount earned from July 26, 1979 through July 30, 1981, inclusive of both dates, on the portion of the Fund allocable to the outstanding principal amount of the 8-7/8% Debentures, less the 8-7/8% interest per annum actually paid and accrued with respect to such period on said Debentures); plus

(ii) the amount earned after July 30, 1981 on the portion of the Fund allocable from time to time to the 8-7/8% Debentures.

(b) In favor of Chase, as Trustee with respect to the 5-3/8% Debentures, in the amounts of:

(i) $2,439,810 (representing the amount earned from July 26, 1979 through July 30, 1981, inclusive of both dates, on the portion of the Fund allocable to the outstanding principal amount of the 5-3/8% Debentures, less the 5-3/8% interest per annum actually paid and accrued with respect to such period on said Debentures); plus

(ii) the amount earned after July 30, 1981 on the portion of the Fund allocable from time to time to the 5-3/8% Debentures.

(c) In favor of Chase, as Trustee with respect to the Port Huron Bonds, in the amounts of:

(i) $2,278,111 (representing the amount earned from November 26, 1979 through July 30, 1981, inclusive of both dates, on the portion of the Fund allocable to the principal amount of the Port Huron Bonds outstanding from time to time, less the 6-1/4% interest per annum actually paid and accrued with respect to such period on said Bonds); plus

(ii) the amount earned after July 30, 1981 on the portion of the Fund allocable from time to time to the Port Huron Bonds.

(d) In favor of Union Planters, as Trustee with respect to the Itawamba Bonds, in the amounts of:

(i) $1,363,678 (representing the amount earned from November 26, 1979 through July 30, 1981, inclusive of both dates, on the portion of the Fund allocable to the principal amount of the Itawamba Bonds outstanding from time to time, less the 6-1/4% interest per annum actually paid and accrued with respect to such period on said Bonds); plus

(ii) the amount earned after July 30, 1981 on the portion of the Fund allocable from time to time to the Itawamba Bonds.

6. Upon execution of this Judgment, payment of the amounts set forth in Paragraphs 4 and 5 above shall be made by the respective Indenture Trustees to the holders of the 8-7/8% Debentures (subject to the provisions of Paragraph 7(b) hereof), 5-3/8% Debentures, Port Huron Bonds and Itawamba Bonds, respectively, who surrender such securities for payment, and payment of their pro rata shares of the amounts set forth in Paragraphs 5(c) and (d) above shall be made by the Indenture Trustees to former holders of Port Huron and Itawamba Bonds whose bonds were retired after November 26, 1979 by operation of a sinking fund.

7. (a) The Indenture Trustees have judgment against UV, the Trustees of the UV Trust, and Sharon jointly and severally, directing them to pay to the Indenture Trustees their reasonable costs and expenses, including reasonable attorneys' fees, in accordance with the aforesaid Indentures and Lease Guaranties; and (b) the attorneys for the Intervenors shall be paid a reasonable fee from the amounts awarded pursuant to Paragraphs 4(a) and 5(a) hereof.

8. This Court shall retain jurisdiction of these actions for the purpose of (a) resolving any matter pertaining to the administration of this Judgment pending appeal, if any, and (b) determining reasonable costs and expenses of this action, including reasonable attorneys' fees, as have been and shall be incurred by the Indenture Trustees and Intervenors.

9. The claims ("Premium Claims") of Chase as Trustee with respect to the 5-3/8% Debentures and the Port Huron Bonds, Union Planters as Trustee with respect to the Itawamba Bonds, Manufacturers as Trustee with respect to the 8-7/8% Debentures, and Intervenors on behalf of themselves and the Class (the "Premium Claimants") for the payment of redemption premiums on the 5-3/8% Debentures, the Port Huron Bonds, the Itawamba Bonds and the 8-7/8% Debentures, be and they hereby are dismissed with prejudice, and each of Sharon, UV, and the UV Trustees have judgment against each of the Premium Claimants on the Premium Claims.

10. The Indenture Trustees, and Intervenors on behalf of themselves and the Class, have judgment impressing a con-

structive trust (the "Constructive Trust") for the benefit of the Indenture Trustees, as Trustees, and for the benefit of Intervenors and the Class, over that portion of the fund deposited pursuant to the April Agreement that equals the sum of amounts awarded in Paragraph 4 and subparagraph (i) of Paragraphs 5 (a), (b), (c) and (d) hereof ($122,240,150), plus $2,000,000 as an estimated amount to cover the costs and expenses referred to in Paragraph 7 hereof; and during the pendency of the appeal herein, if any, the funds over which the Constructive Trust has been impressed, including all amounts earned on such funds after July 30, 1981, shall be held to the credit of this action and the Indenture Trustees, as Trustees, and Intervenors and the Class, in the accounts in which said funds are now held, and shall be invested or reinvested as permitted by the April Agreement at the direction of Sharon; and the Constructive Trust shall remain in effect during any such further proceedings, and until final disposition of the claims of the Indenture Trustees, Intervenors and the Class against Sharon, UV and the Trustees of the UV Trust. Upon execution of this Judgment, said trust funds shall be applied by the holders thereof, the Chase Manhattan Bank N.A. and Manufacturers Hanover Trust Company, to pay the amounts referred to in Paragraphs 4, 5, and 7 hereof by depositing with the appropriate indenture trustee the amounts awarded in its favor by such paragraphs. Any portion of the $2,000,000 estimated amount referred to above in this paragraph, and the earnings applicable thereto, not required for the payment of costs and expenses referred to in Paragaph 7 above will be excluded from the deposit referred to in the next preceding sentence. Any amounts now held by Chase and Manufacturers pursuant to the April Agreement or order of this Court that exceed the amount set forth above for the establishment of the Constructive Trust shall be remitted to Sharon upon the entry of this Judgment.

11. During the pendency of the appeal herein, if any, amounts equal to the semi-annual installments of interest which would have become due on the 8-7/8% Debentures, the 5-3/8% Debentures, the Port Huron Bonds, and the Itawamba

Bonds, had the indebtedness represented by said Debentures and Bonds not been held to be due and payable as set forth in this Court's opinions and orders dated May 11 and May 29, 1981, shall be paid to the Indenture Trustees for the benefit of the holders of said Debentures and Bonds on the dates when such installments would have become due. Such payments shall be made from the earnings held in the Constructive Trust after entry of this Judgment as described in Paragraph 10 hereinabove; and the Indenture Trustees shall immediately thereafter remit such payments to the holders of the above described Bonds and Debentures pursuant to the terms of their respective Indentures. Such payments shall be credited against the sum of the amounts set forth in subparagraph (ii) of Paragraphs 4(a), (b), (c) and (d) hereof and in subparagraph (ii) of Paragraphs 5(a), (b), (c) and (d) hereof.

12. Upon payment, satisfaction and discharge of all liabilities and obligations on UV's public debt securities in accordance with the terms of the aforesaid Indentures, and full satisfaction of this Judgment, any funds remaining in the Constructive Trust shall be remitted to Sharon.

13. Until the filing of a notice of appeal from this Judgment, and during the pendency of the appeal herein, if any, execution of this Judgment shall be stayed in its entirety except with respect to (a) the establishment and administration of the Constructive Trust and the remission to Sharon of the excess funds held by Chase and Manufacturers referred to in Paragraph 10 of this Judgment and (b) the semi-annual payments in lieu of interest referred to in Paragraph 11 of this Judgment.

14. In the event that an appeal is taken from this Judgment, the Constructive Trust shall stand as security for the amounts awarded herein, and the filing of a supersedeas bond shall not be required.

New York, New York
August 17th, 1981

/s/ Henry F. Werker
U.S.D.J.

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Twelfth day of November, one thousand nine hundred and eighty-two.

Nos. 81-7664, 81-7674,
81-7682, 81-7694, 81-7702

Filed November 12, 1982

SHARON STEEL CORPORATION,
Plaintiff-Appellant-Cross Appellee,

—v.—

THE CHASE MANHATTAN BANK, N.A. and MANUFACTURERS HANOVER TRUST COMPANY,
Defendants-Appellees-Cross Appellants.

MANUFACTURERS HANOVER TRUST COMPANY,
Third-Party Plaintiff-Appellee-Cross Appellant,

—v.—

UV INDUSTRIES, INC.,
Third-Party Defendant-Appellant-Cross Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel

for the plaintiff-appellant-cross appellee, Sharon Steel Corporation,

Upon consideration by the panel that heard the appeal, it is ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by:

Francis X. Gindhart
Chief Deputy Clerk

No. 82-1142

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

SHARON STEEL CORPORATION, et al.,

Petitioners,

—v.—

THE CHASE MANHATTAN BANK, N.A., et al.,

Respondents.

BRIEF OF INDENTURE TRUSTEES AND INTERVENING DEBENTUREHOLDERS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Did the United States District Court for the Southern District of New York (Werker, J., presiding) and the United States Court of Appeals for the Second Circuit (Feinberg, C.J., Newman, and Winter, JJ., presiding) misconstrue a boilerplate contractual provision in unanimously rejecting the claims of Sharon Steel Corporation ("Sharon Steel") that

(a) its purchase of the remaining assets of UV Industries, Inc. ("UV"), in connection with UV's liquidation and piecemeal disposition of assets, constituted a purchase of "all or substantially all" of UV's assets, as that phrase is used in four separate trust indentures and lease guaranties whose terms are expressly governed by the laws of Michigan, New York and Mississippi, and

(b) it is thus entitled to act as successor obligor to UV under the indentures and lease guaranties?

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IN THE

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No. 82-1142

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—v.—

THE CHASE MANHATTAN BANK, N.A., et al.,

Respondents.

BRIEF OF INDENTURE TRUSTEES AND INTERVENING DEBENTUREHOLDERS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Indenture Trustees The Chase Manhattan Bank, N.A., Manufacturers Hanover Trust Company and Union Planters National Bank of Memphis (the "Indenture Trustees") and an intervening class of holders of certain UV debentures (the "Intervenors") submit this Brief in Opposition to Sharon Steel's and UV's Petition for a Writ of Certiorari.[1]

STATEMENT OF THE CASE

This action arises out of Sharon Steel's efforts to have itself declared successor to UV under the successor obligor provi-

1 A listing of parents, subsidiaries, and affiliates of the Indenture Trustees and Intervenors pursuant to Sup. Ct. R. 28.1 is annexed hereto as Appendix A.

sions of four separate trust indentures and lease guaranties governing certain outstanding public debt obligations of UV.[2] Those provisions mandated that Sharon Steel could not succeed as obligor to UV unless it could demonstrate that it had purchased "all or substantially all" of the assets of UV.[3] Sharon Steel claimed it had made such a purchase. The Indenture Trustees, charged with enforcing the terms of the indentures and lease guaranties and safeguarding the rights of the public debtholders of UV, refused to recognize Sharon Steel as successor obligor because its purchase of a portion of UV's assets, as part of UV's piecemeal disposition of assets pursuant to a voluntary plan of liquidation and dissolution, failed to satisfy the terms of the indentures and lease guaranties.

The courts below ruled in favor of the Indenture Trustees and Intervenors, finding that UV, having voluntarily adopted a plan of liquidation and dissolution and thereafter distributing $274 million to its shareholders, disposed of its assets in three large segments to three different purchasers, no one of which bought "all or substantially all."

On March 26, 1979, UV's shareholders approved (i) the adoption of a voluntary plan of liquidation and dissolution requiring the sale of the assets of UV within a 12-month period, and (ii) the sale of UV's principal subsidiary, Federal Pacific Electric Company ("Federal"), for $345,000,000 to a subsidiary of Reliance Electric Company. The following day, UV filed its Statement of Intent to Dissolve[4] with the Secretary

2 The trust indentures and lease guaranties are described in the Court of Appeals' opinion, *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1042-45 (2d Cir. 1982), Petitioners' Appendix ("Pet. App.") A at 5a-11a.

3 The standard successor obligor provisions are quoted in full in the Court of Appeals' opinion, 691 F.2d at 1043-45 nn.4-8, Pet. App. A at 7a-10a nn.4-8.

4 Petitioners argue that the indentures and lease guaranties "give no significance to the adoption of a plan of voluntary liquidation." This argument ignores the legal consequences imposed by the corporation law of Maine which has adopted the Model Business Corporation Act.

(Footnote continued on following page.)

of State of Maine, its state of incorporation, and two days thereafter consummated the sale of Federal. (In 1978, Federal generated 60% of UV's operating revenues and 81% of its operating profits. It constituted 44% of the book value of UV's assets and 53% of operating assets.) Approximately a month later UV made an initial $18 per share liquidating cash distribution to shareholders (totalling approximately $274 million) from the proceeds received from the sale of Federal. 691 F.2d at 1045-46, Pet. App. A at 11a-12a.

In October 1979, as the next step in the implementation of its plan of liquidation, UV sold most of its oil and gas properties to Tenneco Oil Company for $135 million in cash. (In 1978, UV's oil and gas properties had produced 2% of its operating revenues and 6% of operating profits and accounted for 5% of book value assets and 6% of operating assets.) 691 F.2d at 1046, Pet. App. A at 11a, 14a.

Finally, in November, 1979, Sharon Steel proposed to buy what remained of UV's assets. UV and Sharon Steel entered into an "Agreement for Purchase of Assets" (the "Purchase Agreement") and an "Instrument of Assumption of Liabilities" (the "Assumption Agreement") on November 26, 1979. Under the Purchase Agreement, Sharon Steel acquired all of the assets owned by UV on November 26, which consisted of UV's Mueller Brass subsidiary and metals mining assets (which together in 1978 produced 13% of profits, 38% of revenue and constituted 34% of book value assets and 41% of operating assets), and $322 million in cash or the equivalent. Sharon Steel's purchase price of $518 million was comprised of $411 million of Sharon Steel subordinated debentures due in 2000 (then valued at 86% or $353,460,000) plus $107 million in

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(Footnote continued from previous page.)

With the filing of its Statement of Intent to Dissolve, UV ceased to be a going business enterprise, its powers being limited to discharging its contracts; marshalling its assets; and paying, satisfying and discharging its liabilities. 13-A Me. Rev. Stat. Ann. §§ 1105, 1106.3 (1971). And, of course, the actual liquidation of UV without payment of its public debt is a default under the indentures and lease guaranties. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 521 F. Supp. 118, 122-23 (S.D.N.Y. 1981).

cash. 691 F. 2d at 1046, Pet. App. A at 11a, 14a-15a. As the Second Circuit observed, approximately 23% of the "purchase price," $107 million, was merely a swap of cash for cash. 691 F.2d at 1051, Pet. App. A at 21a.

Under the Assumption Agreement, Sharon Steel assumed UV's liabilities, including UV's public debt. Upon its execution, UV unilaterally announced that it had no further obligations under the indentures or lease guaranties, and Sharon Steel delivered to the Indenture Trustees supplemental indentures and assumptions of lease guaranties, seeking recognition of Sharon Steel as successor obligor to UV. The Indenture Trustees refused to sign these documents and this litigation ensued. 691 F.2d at 1046-47, Pet. App. A at 15a. The diversity jurisdiction of the federal district court in New York was invoked to obtain enforcement of the successor obligor provision of the indentures and lease guaranties.[5]

Prior to trial, Sharon Steel successfully opposed the Indenture Trustees' and Intervenors' motion for summary judgment by asserting that the meaning of the successor obligor provision of the indentures and lease guaranties, and the intent of the parties with respect to its interpretation, were unclear, and raised genuine issues of fact as to which it had the right to present extrinsic evidence to a jury. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 88 F.R.D. 38, 43 (S.D.N.Y. 1980). Agreeing that the disputed provision "was not wholly unambiguous," and giving Sharon Steel every benefit of the doubt, the district court, during an 11-day trial, allowed it to present "voluminous testimony and other evidence," 691 F.2d at 1047, Pet. App. A at 17a, to a jury as to interpretation and intent of the parties. In the course of that presentation, expert witnesses testified that the facts surrounding Sharon Steel's

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5 In an amended complaint, Sharon Steel also asserted that the Indenture Trustees' and Intervenors' conduct had violated the federal antitrust laws and invoked the jurisdiction of the district court under those statutes. The Second Circuit determined that "Sharon's antitrust claims border on the frivolous." 691 F.2d at 1052, Pet. App. A at 27a.

purchase of UV's assets (with respect to which the successor obligor provision was to be interpreted) were unique in their experience. 691 F.2d at 1048, Pet. App. A at 20a.

At the close of Sharon Steel's case, the district court found that Sharon Steel had failed to establish a *prima facie* case with respect to its claim of entitlement to be recognized as successor obligor to UV. In two carefully reasoned decisions, the United States District Court for the Southern District of New York (Werker, J., presiding) granted a directed verdict and summary judgment in favor of the Indenture Trustees and Intervenors, *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 521 F. Supp. 104 (S.D.N.Y. 1981) (granting motion for directed verdict) and 521 F. Supp. 118 (S.D.N.Y. 1981) (granting motion for summary judgment), and the United States Court of Appeals for the Second Circuit (Feinberg, C.J., Newman, and Winter, JJ., presiding) unanimously affirmed. 691 F.2d 1039 (2d Cir. 1982).

REASONS FOR DENYING THE WRIT

This petition for a writ of certiorari involves nothing more than the interpretation under state law of a boilerplate contract provision, the meaning of which was "not wholly unambiguous." 88 F.R.D. at 43. As such, the petition presents no "special and important reasons" that should lead this Court to exercise its discretion and undertake a review of the unanimous decision of the Second Circuit, *see* Sup. Ct. R. 19, a conclusion that is only reinforced by this Court's previous denials of petitions for writs of certiorari in actions such as *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929 (5th Cir.) (en banc), *cert. denied*, 454 U.S. 965 (1981), and *Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R. Co.*, 680 F.2d 933 (3d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3409 (U.S. Nov. 29, 1982) (No. 82-622), upon which Sharon Steel so heavily relies.[6]

6 Unlike those two actions, this action involves no claimed violation of the federal securities laws, but only a dispute as to proper interpretation of a contract provision under relevant state law.

Despite Sharon Steel's assertion to the contrary, nothing in the Second Circuit's decision herein conflicts with the Fifth Circuit's decision in *Broad v. Rockwell Int'l Corp.* In *Broad v. Rockwell Int'l Corp.*, the Fifth Circuit was required to interpret an indenture provision relating to debenture holders' conversion rights, which was held to be unambiguous, and decide whether it should ignore the plain meaning of that provision. The Fifth Circuit declined to do so under established rules of contract interpretation. In this action, the Second Circuit was required to interpret a substantively different indenture provision that was asserted and determined to be "not wholly unambiguous," 88 F.R.D. at 43, and determine, in light of unique factual circumstances, its correct interpretation under equally well-established principles of contract interpretation. *See Cromwell Towers Redev. Co. v. Yonkers*, 41 N.Y.2d 1, 6, 359 N.E.2d 333, 337, 390 N.Y.S.2d 822, 826 (1976). In engaging in this judicial exercise, the Second Circuit expressly acknowledged the teaching of *Broad v. Rockwell Int'l Corp.* regarding the interpretation of indentures and avowed its intention to follow that teaching. 691 F.2d at 1048, Pet. App. A at 19a. Whatever differences may exist between the Fifth Circuit's decision in *Broad v. Rockwell Int'l Corp.* and the Second Circuit's decision herein, they in no way represent a conflict in legal conclusions or methods of analyses, but only differences that would necessarily result from any court's proper interpretation of contract provisions quite different in substance and ambiguity.

Similarly, despite Sharon Steel's intimations to the contrary, nothing in *Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R. Co.* suggests any conflict either with the Second Circuit's decision herein or between the latter decision and the Fifth Circuit's decision in *Broad v. Rockwell Int'l Corp.*

Just as this petition involves no conflict between decisions of courts of appeal on the same matter, it likewise involves no error on the part of the Second Circuit in the resolution of any federal policy or state law question or any departure from the accepted and usual course of judicial proceedings. *See* Sup. Ct. R. 19. There is no unique issue of federal law involved. As

noted above, the issue here is one of contract construction under state law in circumstances where Sharon Steel itself asserted the lack of clarity of the contract provisions, its own witnesses conceded the uniqueness of the factual circumstances in light of which the provisions were to be interpreted, and there was a failure of proof on the part of Sharon Steel. In resolving the asserted ambiguity and interpreting the disputed provisions, the Second Circuit set forth a clear holding that protects the interests of both debtors and creditors and that will guide counsel and clients should this unique issue ever arise again. 691 F.2d at 1051, Pet. App. A at 26a. The charge that such a result "will no doubt breed litigation," Petition at 15, is misplaced.

Finally, in resolving the ambiguity Sharon Steel asserted existed, the lower federal courts made no mistake. Their conclusion is in complete accord with the "single reported decision construing a successor obligor clause, *B.S.F. Company v. Philadelphia National Bank*, 204 A.2d 746 (Del. Sup. Ct. 1964)." 691 F.2d at 1050, Pet. App. A at 23a. Moreover, in rejecting the interpretation of the successor obligor provisions proffered by Sharon Steel, the courts rejected not so much a literal reading of the indenture and lease guaranty provisions as an illogical reading, unsupported by fact or law.[7] As the district court pointed out, Sharon Steel's approach:

> [c]arried to its logical conclusion . . . would enable the final purchaser of the assets of a corporation engaged in a plan of liquidation to claim that it is the successor corporation because it purchased all the assets possessed by the selling corporation on the date of sale, regardless of how infinitesimal those assets were as compared to the total assets of the corporation. Such a result clearly would

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7 Sharon Steel's reference to other optional asset restrictions that supposedly could be, but are not, in the indentures—and are customarily not included in public debt indentures—is irrelevant (Petition at 12). As *Commentaries on Model Debenture Indenture Provisions* demonstrates, these optional asset restrictions are only a means of restricting *lesser* transfers than those covered by the successor obligor provision. American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions* 423-25 (1971).

> leave the bondholders of a corporation without any protection, thereby defeating the purpose of the successor corporation provisions.

521 F. Supp. at 114, Pet. App. B at 48a-49a. In affirming the district court, the Second Circuit expressed an identical concern about the interpretation Sharon Steel sought to impose on the indenture and lease guaranty provisions. 691 F.2d at 1051, Pet. App. A at 25a-26a.

CONCLUSION

For the reasons set forth above, the Indenture Trustees and Intervenors respectfully request this Court to deny the petition for a writ of certiorari.

February 8, 1983

Respectfully submitted,

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Appendix A

Rule 28.1 Listing of Parents, Subsidiaries, and Affiliates of Respondents

THE CHASE MANHATTAN BANK, N.A.

AOI Lease Co., Ltd.
Acero Estructural del Tolima, Ltda.
Addison Road Properties Corp.
Agrob Ceramics, Inc.
Ahoramas Corporacion de Ahorro y Vivenda
Alaccept Ltd.
Alexandria House Inc.
Alkmaarsche Bank N.V.
Alliance Acceptance Co., Ltd.
Alliance Acceptance (Wholesale) Pty., Ltd.
Alliance Acceptance (Qld) Ltd.
Alliance Commercial Finance Ltd.
Alliance Credit (ESW) Pty., Ltd.
Alliance Credit (W.A.) Pty., Ltd.
Alliance Finance (Leasing) Pty., Ltd.
(Formerly Oxford Alliance Pty., Ltd.)
Alliance Holdings Limited
Alliance-Pibete Unit Trust
Almacenadora Del Comercio De Depositos Generales, S.A.
Almacenera Del Peru, S.A.
Amanah Chase Merchant Bank Berhad
Amsterdamse Mij Tot Stadsherstel N.V.
Annbrook, Inc.
Anne Street Corp.
Ardev Corporation
Arnica Pty., Limited
Arrendacima, C.A.
Arrendadora Cremi, S.A.
Arrendamiento Y Credito, S.A.
Atlantic Bank, Ltd.
Augusta Regency, Inc.
Azucarera Central, S.A.

Banco Atlantida, S.A.
Banco Central Hipotecario
Banco De Investimentos Lar Brasileiro, S.A.
Banco Del Comercio
Banco Del Comercio (Panama), S.A.
Banco Hipotecario Dominicano, S.A.
Banco Lar Brasileiro, S.A.
Banco Latinoamericano de Exportaciones, S.A.
Banque De Commerce, S.A.
Banque De Reescompte Et De Placement
Banque Ivoirienne De Developpement Industrial
Beesley, John Developments
Belgo Factors, N.V.
Belle Haven East Apartments Corp.
Berkeley Service Corporation
Berkley Road Land Corp.
Beta Predial Limitada
Beverly Bay Corporation
Bourke Street Nominees Pty., Ltd.
Bouw-en Exploitatiemaatschappij van Onroerende Goederen Bomij B.V.
B.V. Administratiekantoor van de Nederlandse Credietbank N.V.
B.V. Algemene Mij "ALMIJ"
B.V. Exploitatiemaatachappij van Onroerende Goederen "KAMIJ"
B.V. Factor—Maatschappij Nederland
B.V. Financieringemaatschappij De Eerste Utrechtse
B.V. Maatschappij Tot Exploitatie van Kantoorlokalen En Andere Onroerende Goederen
CCC Holding, Inc.
CMRCC, Inc.
CNG International Limited
Calabar Veneer & Plywood Ltd.
Canudos Limited
Casa Propria Asociacion De Ahorro Y Prestamo, S.A.
Casa Y Terrenos, S.A.
Cedar Holdings Inc.

Centennial Projects Pty. Ltd.
Centrale De Livraison De Valeurs Mobilieres, (Cedel) S.A.
Cerveceria Hondurena, S.A.
Chase Agency Services, Inc.
Chase Bank A.G.
Chase Bank S.A.
Chase Bank & Trust Co. (C.I.) Limited
Chase Bank Cameroon, S.A.
Chase Bank International
Chase Bank (Ireland) Ltd.
Chase Commercial Corporation
Chase Commercial Corporation of New York
Chase Company, Inc., The
Chase Econometrics/Interactive Data Corp.
Chase Finanziaria, S.p.A.
Chase Home Mortgage Corporation
Chase Home Mortgage Corp. of the Southeast
Chase International Investment Corporation
Chase Investors Management Corporation New York
Chase Ireland (Nominees) Limited
Chase Manhattan Bank Asia Limited
Chase Manhattan Bank (Austria), A.G.
Chase Manhattan Bank Luxembourg, S.A.
Chase Manhattan Bank, N.A., The
Chase Manhattan Bank (Switzerland)
Chase Manhattan Bank of Canada
Chase Manhattan Bank (U.S.A.), National Association
Chase Manhattan Bank Oy
Chase Manhattan Bank Bran-Air #1 Corp.
Chase Manhattan Bank B-Air Holdings Corp.
Chase Manhattan Capital Corporation
Chase Manhattan Capital Markets Corporation
Chase Manhattan Capital Markets (Holdings), Inc.
Chase Manhattan Corporation
Chase Manhattan Financial Services, Inc.
Chase Manhattan Government Securities Inc.
Chase Manhattan (Hong Kong) Nominees Limited
Chase Manhattan Industrial Bank
Chase Manhattan Leasing Canada, Ltd.

Chase Manhattan Leasing Corporation
Chase Manhattan Limited
Chase Manhattan (Singapore) Nominees Private Limited
Chase Manhattan of California, Thrift Corporation
Chase Manhattan of Utah
Chase Manhattan Overseas Banking Corporation
Chase Manhattan Overseas Corporation
Chase Manhattan Overseas Finance Corporation
Chase Manhattan Overseas Finance Corporation N.V.
Chase Manhattan Realty Capital Corporation
Chase Manhattan Realty Leasing Corporation
Chase Manhattan, S.A.
Chase Manhattan Service Corporation
Chase Manhattan Trust Cayman Limited
Chase Manhattan Trust Corporation Limited
Chase Manhattan Trust Corporation (Nominees) Limited
Chase Merchant Bankers Jamaica Limited
Chase Merchant Bank Nigeria, Limited
Chase Merchant Services Corporation
Chase National Bank (Egypt), S.A.E., The
Chase National Corporate Services, Inc.
Chase N.B.A. Finance, Ltd.
Chase N.B.A. Group Limited
Chase N.B.A. New Zealand Group Holdings, Ltd.
Chase N.B.A. New Zealand Group, Ltd.
Chase N.B.A. Securities, Limited
Chase N.B.A. Securities Limited New Zealand
Chase N.B.A. Underwriters Limited
Chase Nominees Ltd.
Chase Oil Company
Chase T/C Service Corp.
Chase Trade Finance, Ltd.
Chase Trade Information Corporation
Chase Trade Services, Inc.
Chase U.S. Consumer Services Inc.
Chiyoda Lease Co., Ltd.
Chulan Nominees Sdn. Berhad
Color Mate, Inc.

Colsquare Corporation
Compania Almacenadora, S.A.
Compania Azucarera Choluteca, S.A.
Compania Azucarera Hondurena, S.A.
Compania Azucarera Yogoa S.A.
Compania De Bienes Atlantida, S.A.
Computer Power Inc.
Consolidated Nominees, Ltd.
Coombabah Square Center Pty. Ltd.
Convertible Capital Advisory Company, S.A.
Corporacion Financiera De Caldas
Corporacion Financiera Del Tolima
Corporacion Financiera De Valle
Corporacion Forestal del Tolima
Corporacion Forestal e Industrial De Olancho
Corporacion Grancolombiana De Ahorro Y Vivienda, S.A.
Correctora De Seguros Lar Brasileiro Limitada
Country Meadows, Inc.
Cottontail Plaza, Inc.
Crec Inc.
Credit Guarantee Corporation—Malaysia Berhad
Cross River Mille Limited
Crystal Rivers Properties, Inc.
Dai Shi Lease Co., Ltd.
Desarrollo Industrial, S.A.
Diamond Lease Company Limited
Diamond Lease (Hong Kong) Limited
Dinant Limited
Diners Club Benelux, S.A.
Distribuidora de Titulos E Valores Mobiliarios Lar Brasiliaro, S.A.
Dominion Developments Pty. Ltd.
Durham Development Pty., Ltd.
Duval County Properties, Inc.
Edgewater Villa Properties, Inc.
Embassy House Properties, Inc.
Empire Holdings, Inc.
Equitable Nominees Ltd.

Essence Communications
Essex-West Hillsborough Avenue Corporation
Export Credit Insurance Corporation of Singapore
F.W. Indiana Property Corp.
Fabrica Nacional De Sacos, S.A.
Filinvest Credit Corporation
Filinvest Finance (H.K.) Ltd.
Financeira Lar Brasileiro, S.A.
Financerie d'Investissements et de Construction Immobiliere (FICI)
Flick Developments Pty., Ltd.
Fomento E Desarrollo del Norte, S.A.
Fomento E Inversiones, S.A.
Fort Dearborn Mortgage Company
Fountain Crest Inc.
Four Seasons of DeLand, Inc.
G&G Developments Pty. Ltd.
Glendale Galleria, Inc.
Global Trading International Corporation, S.A.
Greenlake Shopping Center, Inc.
Groningse Maatschappij Tot Stadsherstel, N.V.
HIC Management Corporation of Florida
HIC Management Corporation of North Carolina
HIC Sewer & Water Corporation of North Carolina
Half Moon Towers of Miami, Inc.
Hallandale Properties Inc.
Handling Equipment Rentals Pty., Ltd.
Harbour Town Development, Inc.
Hayward—Route 28, Inc.
Helensvale Commercial Centre Pty., Ltd.
Helensvale Estates Proprietary Limited
Hickory Lakes of Brandon, Inc.
Hilton Hotel Maatschappij Amsterdam
HoCo of Greenlake, Inc.
Hong Kong Commodities Guarantee Corporation
Hoteles De Honduras, S.A.
Housing Investment Corporation
Hull 1882 Pty., Ltd.

Hull 1883 Pty., Ltd.
Industrial Finance Corp. of Thailand
Institut de Reescompte Et De Garantie
Interactive Data GmbH
Interactive Data Services, Inc.
Inter-Americas Assessoria Financiera Limitada
International Investment Corporation For Yugoslavia, S.A., The
Inversiones Atlantida, S.A.
Inversiones Lomesa, S.A.
Jaccs Co., Ltd.
Jever Limited
Jo-Gunn, Inc.
Kam Yuan Choy Mo (Hong Kong) Limited
Kendale Towers Inc.
Kendale Acres West of Miami, Inc.
Kitakanto Lease Co., Ltd.
Knollwood Land Co., Inc.
Koru Limited
LMS Imoveis Limitada
LaCosta Land Company, Inc.
Lead Caribe, S.A.
Lead de Centroamerica, S.A.
Lead Marketing, Inc.
Lake Solarius Properties Corp.
Lakeland Plaza Shopping Center Inc.
Lar Brasileiro Administracao E Servicios, S.A.
Latin American Agribusiness Development Corporation
Laura Pty., Limited
Layang Limited
Le Tourneau Center of Tampa, Inc.
Leasing Nominees Ltd.
Leasing Lar Brasileiro, S.A.
Lee County Properties, Inc.
Lexington Properties Corp.
Liberia Hotels Incorporated
Libra Bank Limited
Libra Bank (Cayman) Ltd.

Libra Bank International, S.A.
Libra (Finance) Assessoria Financeira Limitada
Libra Financial Services, Inc.
Libra Holdings, Ltd.
Libra International Bank, S.A.—Panama
Libra Nominees Limited
Lindfield Shopping Centre Pty. Ltd.
Libra Trust Limited
Long Bayou, Inc.
Long Beach Leasing Limited
M&M Minerals Corporation
Maatschappij Voor Investeringscrediet 'MAVIC,' N.V.
Maatschappij Voor Trust en Administratiezaken B.V.
Malaysia Export Credit Insurance Berhad
Managed Securities, Ltd.
Managistics, Inc.
Mantova Limited
Manufacturera Latino-Americana, S.A.
Mayfair Housing of Atlanta Corp.
Medical Offices of Northwest Atlanta, Inc.
Meiko Enterprise Co., Ltd.
Middle-Mooney Property Corp.
Midway Development, Inc.
Mij Tot Verhuur En Financiering Van Bedrijfamiddelen Lease Plan Nederland, N.V.
Minnesota Holdings
Moto Lease B.V.
MTBC Leasing Co., Ltd.
Multivac Trading International Corporation, S.A.
N.S. Leasehold, Inc.
N.V. Effectenbewaarbedrijf van de Nederlandse Credietbank, N.V.
Nagano Lease Co., Ltd.
Nassau Racquet Club, Inc.
National Acceptance Corp., Pty, Ltd.
National Alliance Insurance Co., Ltd., The
National Bank for Industrial and Touristic Development
National Investment Bank for Industrial Development, S.A.

Nederlandse Credietbank N.V.
Nederlandse Credietbank (Deutschland) A.G.
Nederlandse Credietbank (Overseas) N.V.
Nederlandse Credietversekering Maatschappij, N.V.
Nederlandse Participatie Maatschappij, N.V.
Nedlibra Finance, B.V.
Nigerian Textile Mills, Ltd.
Nihon Dental Lease, K.K.
Norbax, Inc.
Nordlaw Inc.
North Central Medical Properties, Inc.
North First Gish Corp.
NQB Corp.
ORE Properties, Inc.
Oceania Capital Corporation Limited
Oceanic Shares Corporation
Octogonal Empreendimentos Ltda.
Ohita Lease Co., Ltd.
Omnibus Leasing (1978) Limited
One Fourteen (114) Lease Co., Ltd.
14277 S.W. 62nd Street Corporation
Orion Apartments, Inc.
Overseas Realty Corp.
Overseas Realty Corporation of Panama, Inc.
Overseas Shares Corporation
PAIC Builders, Inc.
PAIC Finance Corporation
PAIC Insurance Advisors Agency, Inc.
PAIC Securities Corporation
P.P.W., Inc.
P.P.W. Sewer Co., Inc.
P.P.W. Water Co., Inc.
P.P.W. Holdings Limited
Pan American Shares Corporation
Papeles Y Cartones, S.A.
Payroll Corporation of America
Perimeter Tower North, Inc.
Peruinvest—Compania De Fomento E Inversiones, S.A.

Petako Pty. Ltd.
Philippine American Investments Corporation, The
Pinebrook Kew Gardens, Inc.
Polisac, S.A.
Port Dearborn Corporation
Portadown Discounts, Ltd.
Private Export Funding Corporation
Private Investment Company for Asia, S.A.
Promenade Incorporated
Publicitaria Tecnica Hondurena
Purcoil (One) Limited
Purcoil (Two) Limited
R.M. Apartments Corp.
R.P. Developments, Ltd.
Real Estate Enterprises Pty., Ltd.
Representative, Inc.
Rijnbank N.V.
Eittenhouse Capital Corporation
River Road Corp.
Robles Del Mar, Inc.
S.H. Investment and Development Corp.
Sample Road—Woodside Drive Corporation
Sandarac Properties, Inc.
Saudi Investment Banking Corporation
Seventy-Seven (77) Lease Co., Ltd.
Shona Limited
Societe de Developpment Regional Antilles
Societe Forestiere Et Industrielle De Balabo (Sofibel)
Societe Immobiliere Rue Pierre Fatio 11
Societe Nationale De Credit A L'Industrie, S.A.
Societe Textile de Kisangani (SOTEXKI)
Society for Worldwide Interbank Financial Telecommunication S.W.I.F.T.
South Atlantic Shares Corporation
Southwinds of Miami, Inc.
Standish Financial Corporation
Statewide Facilities Corporation
Sunrise Lakes Drive East Corp.

'T Mooge Huyslevensverzekeringen Van 1891, N.V.
Tavu Limited
The Mini Warehouse of Irondale, Inc.
The Oaks of Broward, Inc.
The Villas of Fort Myers Beach, Inc.
The Villas of S.W. 120th Avenue, Inc.
The Villas of South Dade, Inc.
Three Oaks Road Corp.
Trans-Tasman Limited
Tree Creek, Inc.
'Triba' B.V.
Trodyne Corporation
Twin Oaks Plaza of Gibsonton, Inc.
Uni-Card Company
Uni-Card Corporation
Uni-Card Inc.
Union Financiere Pour Le Development De L'Economie Cerealiere (Unigrains)
Union Provinciale Immobiliere, S.A.
Uni-Serv Company
Uni-Serv Corporation
Uni-Serv Limited
Venetian Bay View of Naples, Inc.
Vernon 220 Corporation
Video Corporation of America
Virgo Holdings Inc.
Webb Dock No. 5 Containers Terminal Limited
Western Hemisphere Life Insurance Co.
West Hartsdale Avenue Properties Corporation
Westport Nominees Limited
Wilmington International Corporation
Windmill Lake Inc.
Wolf—San Juan Leasing Corp.
Woodside Sharon, Inc.
Wun Holdings Inc.
Yamagata Diamond Lease Co., Ltd.
Yarraluma Land Trust
Zermatt

INTERVENING DEBENTUREHOLDERS

Acadiana Place One Partnership in Commendam
Alexandria Country Club Apartments
Alleghany Corporation
American Homestead Corporations
American National Bond Fund, Inc.
American National Growth Fund, Inc.
American National Income Fund, Inc.
American National Money Market Fund, Inc.
Atrium-Encino, Ltd.
Augusta Green Associates
Baker Avenue Associates
Barker's Landing No. 3
Bedford Plantation, Inc.
Block 836-D, Ltd.
Bloomington Hotel Investors
Brookhollow Joint Venture
Buffalo Savings Bank (successor to Union Dime Savings Bank)
C. L. Machinery Company
Chapman 1980 Exploration and Development Venture
CIGNA Corporation
Cobblestone Associates
Conergics Corporation
Connecticut General Corporation
Connecticut Mutual Financial Services Series Fund I, Inc.
Connecticut Mutual Liquid Account, Inc.
Constitutonal Insurance Company of Canada
Continental Towers Associates I
Continental Towers Associates II
Continental Towers Associates III
Country Capital Income Fund, Inc.
Crow-Biltmore Venture
Deptford Limited Partnership
DHC, Inc.
Diamond M Eagle, Ltd.
Diamond M Falcon, Ltd.
Diamond M Hunter, Ltd.

Dillard's Department Stores, Inc.
Diversified Pension Services, Inc.
Don Cesar Resort Hotel, Ltd.
Dorado Beach Hotel Corporation
Dunphil Joint Venture
Educators Life Insurance Company of America
1100 Wayne Avenue Associates Limited Partnership
Elton Road Associates Limited Partnership
Erieview Associates
Fidelity Bankers Life Insurance Company
Fifth and Race Company
First Variable Life Insurance Company
Franklin Financial Corporation
Gal-Tenn Corporation
Gal-Tex Hotel Corporation
GAMMA INAC, Inc.
Glendale Associates
Hamilton Brothers—INSCO Limited
Hanson-Palmer Associates Limited Partnership
Harfree Holdings Limited
Hedgemore Plaza Associates
Hotel Brunswick, Inc.
Horace Mann Life Insurance Company
Illinois Agricultural Association
Illinois Agricultural Holding Co.
INA Annuity Money Market Fund, Inc.
INA Benefit Services Company
INA Life Insurance Company
INA Life Insurance Company, Ltd.
INA Life Insurance Company of Canada
Investors Diversified Services, Inc.
Investors Life Insurance Company of North America
JTX Club, Inc.
Jackson Place Venture
Kings Crossing Associates
Koll Tustin Business Center, Ltd.
L. S. Holding Company
Leisure Communities, Inc.

Lincoln Eastridge Phoenix Associates
Lincoln Northwood Village Associates Limited
Logan Land Company, Inc.
Marina Airport Building, Ltd.
MarketDyne International, Inc.
MarketDyne of Canada Limited
Matson Place Corporation
Maui Surf Hotel Company
Medical Education Life Fund, Inc.
Membership Assistance Corporation
Meridian Tower Associates
MLS 1980 Gulf Coast Exploration and Development Venture
Monarch Capital Corporation
Monarch Investment Management Corporation
Monarch Resources, Inc.
Monarch Securities, Inc.
Monumental Corporation
MONY Mortgage Investors, Inc.
The Moody Foundation
The Moody National Bank of Galveston
Mosbacher—L.S.H.C., Ltd.
Mutual of Omaha International, Ltd.
Mutual of Omaha Fund Management Company
Mutual of Omaha Insurance Company
National Health Care Corporation
New ASC, Inc.
New Enterprise Associates L.P.
Northbelt Plaza Associates, Limited
Northcoast Investment Corporation
Northland Center Limited Partnership
Norton Life Insurance Company
Oakwood Garden Apartments
Omaha Financial Life Insurance Company
The Omaha Indemnity Company
One Logan Square Associates
Palmetto Federal Savings and Loan
Paragon Place Associates
Park West Two Associates

Pavilion Venture
Penn Charlotte Associates
Penn-Crossroads Associates Limited
Penn Irvine Associates
Penn Lenexa Associates
Penn Lodge Associates
PennMarc Centre Associates
Penn Oaks Associates Limited
Penn-Park Place Associates
Penn-Sutton Associates
Penn Westchase Associates
Penn Westwood Associates
Philadelphia Drilling Company
Philadelphia Eagle Drilling
Philadelphia Falcon Drilling Corporation
Philadelphia Investment Corporation
Philadelphia Investment Corporation of Delaware
Philadelphia Jefferson Corporation
Port Plaza Equities Limited Partnership
Pueblo Mall Limited Partnership
Quail Ridge II Associates
R&B Executive Investments—Westchase Associates
Rasmussen Agency, Inc.
Regency Hill Associates
Remote Technologies Limited Partnership
Reston Office—1 Incorporated
Rodney Square Associates
The St. Paul Companies, Inc.
St. Paul Fire & Marine Insurance Co.
San Felipe Agricultural Manufacturing & Irrigation Company
Scottsdale Executive Center Venture
Secon Properties
Senate Avenue Associates Limited Partnership
Shared Diagnostic Services, Inc.
Silver Lakes Ranches Company, Inc.
1667 K St. N.W. Associates Limited Partnership
1627 K St. N.W. Associates Limited Partnership
Southern Hills Associates

Southpoint Partnership in Commendam
Sower House Associates
Springfield Insurance Company, Inc.
Stoneridge Limited
Sunset Venture I
Tele-Trip Company, Inc.
1015 Fifteenth St., N.W. Associates Limited Partnership
13th & G St. Limited Partnership
Three Village Associates
Transco 1980 Exploration and Development Venture
Tulsa Limited Partnership
1225 Eye St., N.W. Associates Ltd. Partnership
2525 East Arizona Biltmore Circle Corporation
United National Corporation
Universal Associates
The University Life Plan, Inc.
Wallace—Lunt Joint Venture
Washington Heights Associates
Washington National Corporation

MANUFACTURERS HANOVER TRUST COMPANY

Manufacturers Hanover Corporation
Al Saudi Banque
Anglo Romanian Bank, Ltd.
Anglo Yugoslav (Ltd) Limited
Arrendadora Bancomer S.A. de C.V.
Arrendadora Banpesca S.A. de C.V.
Banco Argentino de Inversion, S.A.
Banco de Guayaquil
Banco Unido de Fomento
Bank Mendes Gans, N.V.
Banque de L'Union Haitienne, S.A.
CABC Inc.
Compania Financiera Dominicana S.A.
Corporacion Financiera Colombiana
Credit Bank
Hanover Nominees Limited

Inversiones de Fomento Alcantara, S.A.
Industrial Finance Corp. of Thailand
Industrialization Fund of Finland
Iselin-Jefferson Factors Inc.
ITR Properties Inc.
ITR Properties Maryland Inc.
ITR Properties of NYC Inc.
Korea Industrial Leasing Co., Ltd.
Malaysian Industrial Development Finance Ltd.
Manhan Nominees (H.K.) Limited
Manufacturers Hanover Arrendamento Mercantil, S.A.
Manufacturers Hanover Asia, Ltd.
Manufacturers Hanover Asset Management Limited
Manufacturers Hanover Bank/Belgium, S.A.
Manufacturers Hanover Bank of Canada
Manufacturers Hanover Bank (Guernsey) Ltd.
Manufacturers Hanover Bank Luxembourg
Manufacturers Hanover Bank Nordique
Manufacturers Hanover Commercial Corporation (Del.)
Manufacturers Hanover Commercial Corporation
Manufacturers Hanover Consumer Services
Manufacturers Hanover Credit Corporation Ltd.
Manufacturers Hanover Dealerplan Ltd.
Manufacturers Hanover Executor & Trustee Company Limited
Manufacturers Hanover Export Finance Ltd.
Manufacturers Hanover Financial Corporation
Manufacturers Hanover Home Finance Ltd.
Manufacturers Hanover Holding (Delaware) Inc.
Manufacturers Hanover Industrial Finance Holdings, Inc.
Manufacturers Hanover Industrial Finance Ltd.
Manufacturers Hanover International Banking Corporation
Manufacturers Hanover International Corporation
Manufacturers Hanover International Finance Corporation
Manufacturers Hanover International Holdings Corp.
Manufacturers Hanover Leasing Canada
Manufacturers Hanover Leasing Corporation
Manufacturers Hanover Leasing de Venezuela, S.A.
Manufacturers Hanover Leasing Ltda.

Manufacturers Hanover Leasing Nassau, Ltd.
Manufacturers Hanover Leasing S.A.E.
Manufacturers Hanover Leasing S.p.A.
Manufacturers Hanover Limited
Manufacturers Hanover London Ltd.
Manufacturers Hanover Mortgage Corporation
Manufacturers Hanover, N.A.
Manufacturers Hanover Nominees (Guernsey) Ltd.
Manufacturers Hanover Overseas Capital Corporation
Manufacturers Hanover Property Services A.G.
Manufacturers Hanover Property Services Ltd.
Manufacturers Hanover (Suisse) S.A.
Manufacturers Hanover Trust Company
Manufacturers Hanover Trust Co. of Florida
Manufacturers Hanover Trust Holding (Del.)
Manufacturers Hanover U.K. Holdings Ltd.
Manufacturers Hanover Venture Capital Corporation
Manufacturers Nominees Limited
MH/Edie Investment Counsel
MHT Servicos & Administracao Ltda.
Modern Portfolio Theory Associates, Inc.
National Investment Bank for Industrial Development
Ocean Acceptances (London) Ltd.
Poliolefinas
Private Export Funding Corp.
Private Investment Co. for Asia
P.T. Finconesia
P.T. Manufacturers Hanover Leasing Indonesia
SIFIDA
Societe de Financement et de Development Immobiliere
Societe Immobiliere de la Place du Marche Saint-Honore
Southeast Asia Development Corp., Ltd.
SWIFT
Tokyo Lease Co., Ltd.

UNION PLANTERS NATIONAL BANK OF MEMPHIS

Bank of Eagleville
Brenner Stead & Associates
Chickasaw Capital Corporation
Cleve Business Trust
Hamilton First Bank, N.A.
Handelskredit Bank, A.G.
HHUP of Memphis, Inc.
Indianapolis Business Trust
Madison Loan & Thrift Company
Planters Agricorp, Inc.
Planters Business Trust
Planters Life Insurance Company
Turks & Caicos Banking Co., Ltd.
Union Planters Bank of Nashville
Union Planters Corporation
Union Planters International Bank
Union Planters Risk Management
Westleigh Investment Ltd.

No. 82-1142

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

SHARON STEEL CORPORATION, et al.,

Petitioners,

—v.—

THE CHASE MANHATTAN BANK, N.A., et al.,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners Sharon Steel Corporation ("Sharon Steel"), UV Industries, Inc., and the Trustees of the UV Industries, Inc. Liquidating Trust (collectively, "UV") submit this brief in support of their petition for a writ of certiorari and in reply to the brief in opposition submitted by the respondent Indenture Trustees and Intervenors.

In opposing the petition, the respondents attempt to dismiss the Second Circuit's decision as one of little import which simply involves the application of state contract principles. The Second Circuit's decision does not, in fact, support this description. By interspersing excerpts from the district court's opinion with the language of the Second Circuit's decision,

and by taking certain aspects of that decision out of context, the respondents have molded a new decision to fit their theory of opposition.

On the basis of this hybrid, the respondents have advanced three primary points of opposition to the petition: (1) they attempt to distinguish the Second Circuit's decision in the present action from the Fifth Circuit's decision in *Broad v. Rockwell International Corp.*, 642 F.2d 929 (5th Cir.) (in banc), *cert. denied*, 454 U.S. 965 (1981) (hereinafter "*Broad v. Rockwell*"); (2) they contend that the Second Circuit's decision only concerns state law and is limited by the purported uniqueness of the facts involved and therefore will have no effect on the course of future indenture controversies; and (3) they contend that the Second Circuit's decision was necessary to avoid leaving the debtholders without any protection. Each of these points of opposition is without merit.

1. The Conflict Between the Second and Fifth Circuits Cannot Be Distinguished Away

The respondents implicitly acknowledge that the Second Circuit's decision and *Broad v. Rockwell* embody different approaches to the application of indenture provisions, with inevitably different results. They argue, however, that these decisions can be distinguished, and that therefore no true conflict is present for this Court to resolve. The distinction is alleged to inhere in the presence or absence of ambiguity in the indenture provisions treated by the two circuit courts.

Supposedly, the indenture provisions reviewed by the Second Circuit were ambiguous, and therefore allegedly "unique factual circumstances" involving the particular parties to the action justified the Second Circuit's unorthodox implication of asset sale restrictions not explicitly contained in the indentures. The respondents contend that, in contrast, the *Broad v. Rockwell* indenture was unambiguous and had a "plain meaning" which could not be ignored by the implication of additional rights.

It is noteworthy to say the least that the respondents should now seek refuge in the concept of ambiguity inasmuch as they argued to the Second Circuit that "the Indentures unambiguously require that the 'all or substantially all' test be applied against property owned by UV on the date its liquidation plan commenced. . . ." Appellees' Brief at 41.

The proffered "ambiguity" distinction is misconceived. The Second Circuit's opinion nowhere even implies, much less asserts, that the indenture provision in question is ambiguous. It was not because of any perceived ambiguity that the Second Circuit rejected "a literal reading" as "not helpful." 691 F.2d at 1049; Pet. App. A at 22a.[1]

Both the Second and Fifth Circuits take the position that the application of boilerplate indenture provisions is a matter of law and that factual idiosyncracies in the relations of particular parties should not alter the uniform meaning of such boilerplate provisions. Indeed, the Second Circuit explicitly purported to reject the notion that unique extrinsic facts should alter the meaning of boilerplate indenture provisions:

> "Boilerplate provisions are thus not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties to an indenture. There are no adjudicative facts relating to the parties to the litigation for a jury to find, and the meaning of boilerplate provisions is, therefore, a matter of law rather than fact." 691 F.2d at 1048; Pet. App. A at 18a-19a.

Not only did both circuit courts interpret the respective indentures as a matter of law, but both courts were able to

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1 The respondents strain to attach significance to the district court's statement at an earlier stage in the proceedings that the indenture provision in question is "not wholly unambiguous." Brief in Opp. at 6. Not only is this statement irrelevant to the Second Circuit opinion, but the district court itself ultimately decided to take the case away from the jury and to resolve the indenture question as a matter of law. 521 F. Supp. at 113; Pet. App. B at 47a.

determine a plain, or literal, meaning from the face of the indenture language in issue. It is at that point, however, that the direct conflict between the two courts emerges.

The Fifth Circuit identified the literal meaning of the language of the indenture before it and adhered to that meaning, 642 F.2d at 948-55; the Second Circuit identified the literal meaning of the indenture provision before it, acknowledged that it was the meaning advanced by Sharon Steel, 691 F.2d at 1049; Pet. App. A at 21a, but then jettisoned it in favor of a policy analysis that implied rights and obligations that were never included in the indentures, 691 F.2d at 1049-51; Pet. App. A at 21a-26a. The conflict is clear and indisputable, and cannot be distinguished away.[2]

It is quite remarkable for the respondents to assert that "the Second Circuit expressly acknowledged the teaching of *Broad v. Rockwell Int'l Corp.* regarding the interpretation of indentures and avowed its intention to follow that teaching." Brief in Opp. at 6. The fact is that the Second Circuit referred to *Broad v. Rockwell* solely for the proposition that "uniformity in interpretation is important to the efficiency of capital

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2 In the petition, the petitioners referred to *Pittsburgh Terminal Corp. v. Baltimore & Ohio Railroad Co.*, 680 F.2d 933 (3d Cir.), *cert. denied*, 103 S.Ct. 476 (1982), and both the 3-judge panel and in banc decisions in *Broad v. Rockwell*, as examples of the conflict and disagreement that are engendered by departure from the traditional rule of not implying terms into indentures. In response, respondents offer mere conclusionary statements that no conflict is suggested by those cases. They do not, and cannot, explain away the fact that the two Third Circuit judges who addressed the indenture issue in *Pittsburgh Terminal* reached directly opposite conclusions caused by one judge's reliance on Second Circuit precedent and the other's reliance on *Broad v. Rockwell*. *Compare Pittsburgh Terminal*, *supra*, 680 F.2d at 941, *with* 680 F.2d at 951-52. Similarly, the respondents cannot avoid the fact that in *Broad v. Rockwell*, the Fifth Circuit sitting in banc and applying traditional indenture law reached a decision different from that of the *Broad v. Rockwell* panel which relied on Second Circuit precedent. *Compare Broad v. Rockwell International Corp.*, 614 F.2d 418, 429-30 (5th Cir. 1980) (panel decision), *with Broad v. Rockwell*, *supra*, 642 F.2d at 957-58 (in banc decision).

markets." 691 F.2d at 1048; Pet. App. A at 19a. The Second Circuit in no way, shape, or form acknowledged the teaching of *Broad v. Rockwell* that indenture language is to be read literally, and nowhere in the Second Circuit's opinion is there any avowal of an intention to follow that rule.

The inescapable fact is that one cannot put the two opinions side by side and avoid the conclusion that they conflict because they proceed from fundamentally different conceptions about the role of courts in resolving disputes concerning indenture provisions. The Fifth Circuit follows the tradition of conceiving that role as a narrow one—a tradition largely responsible for the notable self-regulation and relative dearth of litigation in this area of the law. The Second Circuit conceives that role as a broad one. That conception, which impatiently glosses over the literal meaning of indenture language in favor of an analysis of underlying policies and interests, will inevitably breed litigation.

2. The Principle of the Second Circuit's Decision Transcends State Law and Is Not Limited by the Alleged Uniqueness of This Case.

The respondents argue that the Second Circuit's decision depends on peculiarities of state law and on unique circumstances which limit its effect to the case at hand. This argument ignores the expansive language and substance of Judge Winter's opinion.

The opinion nowhere relies on the pecularities of any particular state's law to justify its unprecedented implication of substantive rights. It relies on concepts that transcend state boundaries. It consciously crafts a result intended for national application.

Likewise, the instruments which lie at the center of the present dispute bind persons and entities throughout the country and govern rights and obligations relating to securities traded nationally. To suggest that the present controversy "involves nothing more than an interpretation under state law," Brief in Opp. at 5, blinks reality.

Even if the Second Circuit's decision could somehow be limited to controversies specifically involving successor obligor provisions, its reach would remain considerable. After all, as the Second Circuit itself recognized, 691 F.2d at 1048; Pet. App. A at 18a, such provisions are contained in virtually all corporate trust indentures. Moreover, the Second Circuit's rationale would likely be applied to any type of corporate reorganization or series of asset dispositions. It is ironic that the respondents now contend that the Second Circuit's decision will be limited to only those controversies involving precisely the same circumstances presented in this action: in the proceedings below they argued that their suggested meaning of the Indentures (which the Second Circuit adopted) should be applicable to various types of reorganizations, whether formal or informal. *See, e.g.*, Appellees' Brief at 30, 36, 38-39.

Moreover, the implications of the Second Circuit's decision are broadened, not narrowed, by the reliance on "unique factual circumstances." Prior to the Second Circuit's decision it was accepted that the substantive rights and obligations of parties to an indenture are set by the instrument's explicit language and do not depend on the exigencies of particular factual circumstances. The whole course of indenture law has been toward standardization of expression and interpretation. Thus, in 1939, Congress enacted the Trust Indenture Act to impose uniform obligations on indenture trustees, and in the 1960's and early 1970's, the American Bar Foundation's *Sample Incorporating Indenture and Model Debenture Indenture Provisions* (1965) and *Commentaries on Model Indenture Provisions* (1971) were promulgated to further standardize other common indenture provisions.

The Second Circuit's decision departs irreconcilably from the thrust of indenture law. The decision advances the proposition that the uniform meaning of standardized indenture provisions can no longer be ascertained from the explicit language employed, but rather must be determined individually from each unique set of factual circumstances. By this approach, indenture language will be like a chameleon, changing color

and meaning depending on its surroundings. If the Second Circuit's decision is allowed to stand, the parties who must turn to indentures to "adjust their affairs," 691 F.2d at 1048; Pet. App. A at 19a, will no longer be able to rely on the clear and standardized language of indenture provisions. Instead, the course of indenture law will be diverted to a burdensome case-by-case analysis that is anathema to the national uniformity required in this crucial area of corporate finance.

3. The "Infinitesimal" Scenario Is Inapposite

In attempting to defend the Second Circuit's approach of not giving indenture provisions their literal meaning, the respondents reach back to a passage in the district court's opinion. Brief in Opp. at 7. In that passage, Judge Werker expressed concern about the possibility that under a literal reading of the successor obligor provisions, an obligor could sell all its assets in a series of transactions and then sell an "infinitesimal" amount of remaining assets to another corporation which would purport to assume the debt. 521 F. Supp. at 114; Pet. App. B at 48a-49a. While giving it less emphasis than the district court, the Second Circuit also seemed concerned about this possibility. 691 F.2d at 1051; Pet. App. A at 25a-26a.

These concerns are an overreaction to a hypothetical situation that could not have arisen in this case, that is unlikely to arise, and that, if it ever arose, could be fully dealt with by legal mechanisms already in place to handle such situations. At bottom, these concerns are grounded on the assumption that, short of treating the successor obligor provisions as including implied asset sale restrictions, there is no bulwark against the "infinitesimal" scenario. That assumption is wrong, both in the context of this case and in general.

In the instant case, the dividend restriction in the Indenture covering the senior and largest issue of debt clearly protected the debtholders from the hypothetical worst case which concerned the courts below. That was the protection that was bargained for; that is the protection that was explicitly in-

cluded. It guaranteed the debtholders that regardless of how many distributions or asset sales occurred over time, the distributions could not have the effect of reducing the corporation's assets significantly below the level that existed when the Debentures were issued. No less was relied on when the debt obligations were incurred, but no more could be relied on when those same obligations were assumed.[3] In short, UV could not under these Indentures voluntarily reduce it assets to an "infinitesimal" amount.

Restrictions such as this dividend restriction are common and provide all the protection that is needed against the hypothetical situations envisioned by the courts below. *See* American Bar Foundation, *Commentaries on Model Indenture Provisions* (1971) at 402. But let us assume a situation where no such dividend restriction exists. Even then, the infinitesimal scenario is a red herring. If a corporation sells 99% of its assets, distributes the proceeds, and then seeks to sell the remaining 1% to another buyer who would assume its debt, would the debtholders be without protection as the courts below apparently feared? Obviously, it is totally unrealistic to assume that any buyer would want to assume $100,000,000 of debt if he is purchasing only, say, $1,000,000 in assets. If such a transaction did occur, however, it would be a sham or fraudulent transaction, in which event debtholders would remain safeguarded by a whole panoply of laws that protect credi-

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3 As at least one of the respondent Intervenors admitted quite candidly in an internal memorandum dated after the sale of Federal and after the sale of the oil and gas properties was announced, the dividend restriction was sufficient to safeguard its rights during UV's liquidation:

> "Importantly, Section 4.08 of the indenture under which the 8 7/8% debentures were issued limits the amount of dividends the company can pay out. Our interpretation of Section 4.08 indicates future dividend payments will be restricted to what the company can earn (including any gains on the sale of its assets) and approximately $36 million. In other words, we anticipate UV Industries will have to confront and resolve its long-term debt position before liquidation and distribution of the proceeds goes much further."

tors.[4] (Of course, no one has ever asserted that there was anything sham or fraudulent about the Sharon Steel-UV transaction.)

While debtholders may not find it ideal, there is no inequity in their having to look for their protection to the restrictions—such as the dividend restriction—that have been bargained for in an indenture and to the general legal protections against sham transactions.[5] It is from the specific provisions of the indenture contract alone that debtholders derive those rights that differentiate them from other unsecured creditors.

The Second Circuit clearly erred in proceeding from its own notion of equity to rewrite the contracts by implying covenants and restrictions that could have been included but were not.[6] As the Fifth Circuit in banc said in *Broad v. Rockwell*:

> "It is not the function of a court to rewrite a contract's terms in the process of 'interpretation' to make them accord with the court's sense of equity." *Broad v. Rockwell, supra*, 642 F.2d at 956.

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4 For example, fraudulent conveyance laws prevent an obligor from disposing of its assets for an inadequate return, or, if adequate consideration has been received, from distributing proceeds which are needed to honor the obligor's debts. *See, e.g.*, Uniform Fraudulent Conveyance Act §§ 1-12; N.Y. Debtor & Creditor Law §§ 270-81 (McKinney 1977); *Studly v. Lefrak*, 66 A.D.2d 208, 412, N.Y.S.2d 901 (2d Dep't), *aff'd*, 48 N.Y.2d 954, 401 N.E.2d 187, 425 N.Y.S.2d 65 (1979).

5 In focusing on the alleged inequities that would flow from a literal interpretation, the Second Circuit adopts an approach essentially the same as that followed by the original panel in *Broad v. Rockwell, supra*, 614 F.2d at 429-30. If that panel's opinion had been the last word out of the Fifth Circuit on this subject, there would perhaps be no conflict between circuits for this Court to resolve. But the last word from the Fifth Circuit is its in banc opinion which vacated the panel's decision and which conflicts with the Second Circuit's opinion here.

6 The respondents never meet the argument that the parties could have provided in these Indentures—as is provided in other indentures—that adoption of a plan of voluntary liquidation is a default.

Conclusion

For the reasons set forth above and those contained in petitioners' original petition, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: February 16, 1983

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